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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-606

In re Applications of

BELZ BROADCASTING CO. File No. BPH-871223MI

For Construction Permit for a
New FM Station on Channel 225A
in Bartlett, Tennessee

Appearances

Merilyn M. Strailman on behalf of Belz Broadcasting Company and *Larry A. Miller* on behalf of Chief, Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: March 16, 1992; Released: March 24, 1992

1. There is one applicant remaining in this proceeding. The following issues will be considered in this supplemental decision:

1. To determine whether Julianne Belz intentionally misrepresented or lacked candor with respect to her February 29, 1988 application amendment;

2. To determine whether Julianne Belz intentionally misrepresented, or lacked candor with respect to her knowledge of the status of KWLN as of the date of the aforestated amendment;

3. To determine whether Julianne Belz failed, pursuant to 47 CFR §1.65, to inform the Commission that her aforestated amendment was inaccurate or that circumstances had changed, and whether any such failure was intentional; and

4. To determine whether Julianne Belz intentionally misrepresented, or lacked candor with respect to, her November 14, 1989 application amendment, either in that amendment or in her later representations with regard thereto.

2. Written testimony was exchanged on November 15, 1991. A hearing to examine witnesses was held on December 3, 1991. Tr. 1904-2090. The record was closed on December 3, 1991. Tr. 2090; *Order*, FCC 91M-3396, released December 5, 1991. Proposed findings were filed by both parties on January 24, 1992.

FINDINGS OF FACT

Issues 1-4: Whether Julianne Belz misrepresented or lacked candor in filing amendments on February 29, 1988 and November 14, 1989; whether she lacked candor about the status of her position at KWLN when she filed the February 29, 1988 amendment; and whether she failed to inform the Commission about inaccuracies in her representations when she discovered them.

3. Belz hired Barry Wood, her communications counsel, because he was communications counsel for her parents and brothers. Tr. 2053-54. Wood did not discuss Belz's application with her family, although he assumed they knew she had called him. Tr. 1948, 1951. Belz did not discuss her application with her parents or brothers before it was filed. Tr. 2011, 2050-51. She only discussed the application with Martin Belz, her spouse, Wood and her engineer. Tr. 2050.

4. In January or February of 1988, after Belz had filed her application, she asked her brother, William Pollack, about working at the Pollack Broadcasting Company station in Osceola, Arkansas, KWLN. Belz Remand Exh. 5, at 1; Tr. 2014, 2055. The station was owned by Belz's parents, Marilyn and Sydney Pollack and her three brothers. Tr. 1921. Belz had not been asked to join in the company when it was formed and she was not an investor in KWLN like the rest of her family. Tr. 1914. Belz believed she would gain experience and learn about broadcasting if she worked at KWLN. Tr. 2014, 2056. When she asked William Pollack for the job, he was not aware of her application for Bartlett, Tennessee. Tr. 2055-56, 2014. She apparently did not tell him then either, since he claims he found out about her application in a trade publication in February 1988. Tr. 2011; Belz Remand Exh. 4, at 1.

5. William Pollack suggested that Belz become KWLN's Community Affairs Director, or Community Service Director. Tr. 2016, 2058; Belz Remand Exh. 4, at 2; Belz Remand Exh. 5, at 1. KWLN had recently increased its coverage and opened a sales office in Memphis and William Pollack believed that Belz could represent the station in Memphis. Tr. 2017, 2018; Belz Remand Exh. 4, at 1-2. Pollack suggested to Belz that she talk with KWLN's program or operations director, Brad Young. Tr. 2020, 2060. Belz and Pollack did not discuss wages, hours, duties, or when she would start. Tr. 2019, 2061-62.

6. Both Pollack and Belz believed she would become the Community Affairs Director. Tr. 2027, 2063. But Pollack never would discuss with her when she could begin. Tr. 2021-22, 2063. Belz spoke with her father and asked him to talk with her brother about setting a time when she would actually begin the job. Tr. 1921-22.

7. William Pollack and Sydney Pollack did not tell Belz that they had been negotiating since the fall of 1987 to sell the station to the Dittman Company. Tr. 1910-12, 2029. They believed Belz would be unhappy about the sale since she had not been included as an investor. William Pollack led her on about setting a time to begin the job at the station although he apparently believed there would not be one if the sale was completed. Tr. 2030-31. The sale was being kept confidential and the Pollacks had asked Wood, their counsel, to not tell anyone about the planned sale. Tr. 1914, 1933, 2032; Belz Remand Exh. 4, at 3.

8. Wood, who represented Pollack Broadcasting and Belz, did not tell Belz about the sale. Belz Remand Exh. 3, at 5. When Belz told Wood about her job at KWLN, he said nothing about the sale. When she filed an amendment to her application, on February 29, 1988, informing the Commission that she was going to be Community Affairs Director at KWLN, Wood knew that a contract had been signed for the sale of the station on February 26, 1988. Tr. 1956. Wood had another view of the amendment. He believed that Belz's employment at the Pollack station might make it appear that Belz was just applying for the Bartlett facility for her family. Belz Remand Exh. 3, at 2; Tr. 1976. The amendment notifying the Commission of her position at KWLN was made on the last day applicants could alter their comparative positions. Belz Remand Exh. 3, at 3.

9. In the February 29, 1988 amendment, Belz reported that she had been appointed Community Affairs Director at KWLN and that she would resign her position before the Bartlett station began broadcasting. MMB Exh. 1, at 4. Wood wrote the amendment and he used the word appoint to indicate that Belz had not started the position. Belz Remand Exh. 3, at 3; Tr. 1982. Wood claims he saw the amendment as necessary to insure that Belz informed the Commission that she would sever her connection with the station. Belz Remand Exh. 3, at 4.

10. A few days after the assignment application for KWLN was filed on March 1, 1988, Belz asked William Pollack about when she could begin her job. Belz Remand Exh. 4; at 4; Tr. 2070, 2023, 2033. He then told her the station had been sold and that she could not work at the station. Tr. 2070; Belz Remand Exh. 4, at 4. While the sale was pending a final closing, Pollack had agreed to Dittman's request that no new people be hired. Tr. 2024. If the sale was not completed, Pollack told Belz that she could then become the Community Affairs Director. Tr. 2038, 2071. The sale was closed in June 1988 and Belz did not tell Wood that she did not work at the station because she assumed he knew. Tr. 2071-73; Belz Remand Exh. 4, at 5.

11. Wood next asked Belz about the job in the fall of 1989 and Belz then told him she never worked at the station. Tr. 1988, 1990, 1993-95, 2074, 2075-76; Belz Remand Exh. 3, at 6. Wood understood Belz to have said that she never worked for Dittman. Tr. 1996-97; Belz Remand Exh. 3, at 6. Based on that assumption, Wood wrote the November 14, 1989 amendment which said that Belz had ceased her employment at KWLN (then KMPZ) as of June 1, 1988. Belz Remand Exh. 9, at 4; Belz Remand Exh. 3, at 6-7; Tr. 1997-99. While Belz read the amendment, she thought it was accurate and Wood had used the correct words. Tr. 2076-78. She admits that the word employment should not have been used since she never worked at the station. Belz Remand Exh. 5, at 2-3. When Belz prepared her integration statement, she told her counsel that she did not have any broadcast experience. Tr. 2079, 2003. She never made a claim of broadcast experience. Tr. 2080, 2002-03.

CONCLUSIONS

There is no evidence that Julianne Belz intended to deceive the Commission about her role at KWLN. She also does not appear to have deliberately concealed, or have been evasive, about her role at KWLN. She did fail to accurately inform the Commission about her association with KWLN.

12. Belz did not know that her family was selling KWLN when she notified the Commission that she was going to work there. The record reflects that her parents and her brothers, who owned the station, did not reveal to her that the station was being sold. Even her communications counsel, who also knew the station was being sold, did not tell her because he felt a greater ethical bond to her brothers and parents. William Pollack, Belz's brother, with whom she spoke about working at the station, conceded that he led her on about working at the station rather than reveal to her that there probably would be no job for her at KWLN.

13. When Belz notified the Commission in February 1988 that she had been appointed to a position at KWLN, she believed that she was going to work at the station. Her counsel thought that an amendment should be filed immediately to insure that she made a timely divestiture pledge. Counsel did not ask Belz when she would start working at the station and Belz did not tell him. Belz's counsel knew when the amendment was filed that the station had been sold but he did not know that that meant Belz would not work at the station, and he did not ask her. When counsel again prepared an amendment to inform the Commission that Belz had no connection with the station in November 1989, he said that she had ceased her employment when, in fact, she had never had any. Counsel assumed that Belz had worked at the station and although she read the amendment, Belz did not correct it. These inaccurate statements do not appear to have been intentional. Belz was always aware that she had not worked at KWLN and she states that she thought her counsel knew that also. Belz never claimed broadcast experience on the basis of her employment or possible employment. There is little doubt that she was careless in a number of respects. She should have questioned her counsel about the language used to describe her relationship with KWLN in the two amendments that were filed. She also should have immediately told her counsel and the Commission when her brother told her in March 1988 that she could not work at the station. While these instances of carelessness do not disqualify Belz, they do raise a doubt about her ability to act as a steward of a broadcast license. Nevertheless that doubt is not so great that it cannot be concluded that a grant of her application would serve the public interest.

ACCORDINGLY, IT IS ORDERED that the application of Belz Broadcasting Company (File No. BPH-871224MI) for a construction permit for a new FM station on Channel 255A, Bartlett, Tennessee IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-96

In re Applications of

DAVID H. GREENLEE	File No. BPH-891012MJ
PATRICIA RODGERS	File No. BPH-891012NC

For Construction Permit for a
New FM Station on Channel 260A
in Campbellsville, Kentucky

Appearances

Stanley G. Emert, Jr. on behalf of Patricia Rodgers and *Robert A. Zauner* on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: March 12, 1992; Released: March 24, 1992

1. Six applications were designated for a comparative hearing for this facility. Two applications remain. Greenlee requests approval of a settlement agreement and dismissal of his application. Rodgers requests that the qualifying issue be resolved in her favor and that her application be granted. The following issues will be considered in this decision:

> 1. To determine whether Patricia Rodgers misrepresented that she failed to exchange standard documents because of an error by counsel's clerical staff.
>
> 2. To determine whether Patricia Rodgers is qualified to become a licensee and whether she willfully violated the order to produce documents and should be assessed a forfeiture pursuant to Section 1.80.

2. A prehearing conference was held on July 9, 1991. Tr. 1-5. Written testimony was exchanged on August 29, 1991. Hearing sessions were held on September 3, 1991 (Tr. 6-52) and September 10, 1991 (Tr. 53-132). The record was closed on September 10, 1991. *Order*, FCC 91M-2827, released September 13, 1991. Proposed findings and conclusions were filed by both parties on October 10, 1991. No replies were filed.

FINDINGS OF FACT

Issue 1: Whether Patricia Rodgers misrepresented that she failed to exchange standard documents because of an error by counsel's clerical staff.

3. Documents were due to be exchanged by the parties on July 17, 1991. *Memorandum Opinion and Order*, FCC 91M-2141, released July 11, 1991. In late May or early June 1991, Rodgers and her counsel discussed what documents would have to be provided. Rodgers Exh. 1, at 1. Rodgers sent her counsel newspaper articles on her community involvement. Rodgers Exh. 1, at 8; Tr. 77. Rodgers' counsel suggested to counsel for Greenlee, on June 13, 1991, that they exchange the Commission's list of standard documents. Karon Drinnon, an employee in Rodgers' counsel's office, represented that she sent Rodgers'documents to counsel for Greenlee on July 17, 1991. Rodgers Exh. 2, at 1. She told counsel for Rodgers that she had sent the documents at the time. Id. Rodgers' integration statement was sent on the same day and counsel for Greenlee received two copies in separate envelopes on different days. Tr. 128-30. One copy of the integration statement did not have a signed certificate of service. MMB Exh. 4 and Exh. 5. When questioned, Drinnon said she did not mail the documents to Greenlee; she gave the documents to the firm's receptionist to mail. Tr. 117-18. Drinnon said she told the receptionist to mail both the documents and the integration statement. Tr. 120-21. Drinnon explained that two copies of the integration statement may have been sent because on the day it was due the certificate of service may not have been signed. Tr. 114-16. The copy filed with the Commission, on July 17, 1991, was signed by counsel for Rodgers.

4. When Rodgers met with counsel, on August 5, 1991, to prepare for her deposition, she brought her file. Rodgers Exh. 1, at 1-2. In the file were notes she had made which they decided to provide to Greenlee. Id. Rodgers also provided counsel with a copy of her driver's license. Id. At Rodgers' deposition, she indicated that the notes and documents that she had been questioned about were given to counsel on August 5. Rodgers Exh. 4. Rodgers said she thought that the notes Greenlee's counsel was referring to were the notes she gave to her counsel on August 5 and that the documents were only the originals of those exchanged earlier. MMB Exh. 1. While she gave the originals to her counsel on August 5, she said she had provided him with copies at an earlier time. Tr. 105-06.

CONCLUSIONS

Issue 1: Rodgers did not intentionally withhold documents during this proceeding.

5. Rodgers' explanation of why Greenlee did not receive the standard documents until a month after they were due to be exchanged is that, while instructions were given to send them on time, they apparently were not sent. She maintains that when she said at her deposition that she did not produce the documents to her counsel until August 5, 1991, she only meant that additional documents and the originals of those she thought had been produced in July were provided to him in August. She claims she gave him copies before July 17, 1991. Counsel for Rodgers has not explained whether his

records support that the exhibits were sent or even whether records are kept of what is sent. The record is also inconclusive about what documents Rodgers gave to counsel before the due date, July 17, 1991. In any event, although neither counsel nor Rodgers were careful about producing the documents, it does not appear that they intentionally withheld the documents. Rodgers is qualified to become a Commission licensee.

The settlement agreement with Greenlee

6. Rodgers has agreed to pay up to $45,000 of Greenlee'sexpenses in this proceeding in exchange for dismissing his application. According to documents attached to the supplement to the agreement, Greenlee's expenses exceeded $45,000. The agreement will be approved.

Motion to enlarge against Rodgers

7. Greenlee moves to enlarge issues against Rodgers to determine whether Rodgers falsely certified her financial qualifications and whether she is financially qualified. Rodgers relies on reasonable assurance from the Taylor County Bank in Campbellsville, Kentucky. Greenlee states that Rodgers stated at her deposition that she had not shown the bank a budget or a financial plan. Greenlee argues that Rodgers had not provided the bank with adequate data to provide reasonable assurance of a loan.

8. Rodgers, in her opposition, submits a declaration from James O. Miller, President of the Taylor County Bank. Mr. Miller explains that, before the letter was issued, the bank had a long and established relationship with Ms. Rodgers. He states that the bank is familiar with her assets and credit history. He points out that Ms. Rodgers had told him how much the project would cost and that they had general discussions about her plans for the station. He represents that the bank's commitment was approved by the Board of Directors' Loan Committee. He states that they had an understanding about collateral guarantees, loan terms, and interest rate. He maintains that, if Ms. Rodgers meets the terms of the letter, the bank will make the loan. Rodgers has established that there is no merit to Greenlee's petition and it will be denied.

ACCORDINGLY, IT IS ORDERED that the joint petition for approval of settlement agreement and dismissal of application, filed October 7, 1991, supplemented October 21, 1991 by David H. Greenlee and Patricia Rodgers IS GRANTED and the application of David H. Greenlee (File No. BPH-891012MJ) IS DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the motion of David H. Greenlee to enlarge issues, filed August 23, 1991, supplemented September 6, 1991, IS DENIED.

IT IS FURTHER ORDERED that the motion for extension of time, filed September 20, 1991 by David H. Greenlee IS GRANTED.

IT IS FURTHER ORDERED that the application of Patricia Rodgers (File No. BPH-891012NC) for a construction permit for a new FM station on Channel 260A in Campbellsville, Kentucky IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

FLORIDA CELLULAR MOBIL COMMUNICATIONS CORPORATION — File No. 10854-CL-P-468-A-89

For facilities in the Domestic
Public Cellular Radio Telecommunications
Service on Frequency Block A
in Market No. 468, Maryland 2 (Kent)

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 1992; Released: March 16, 1992

By the Chief, Mobile Services Division:

I. BACKGROUND

1. On January 29, 1992, the Commission issued a Public Notice, Mimeo No. 21449, announcing that on April 8, 1992 the Commission would conduct lotteries to select winning cellular radio applications for twenty-nine Rural Service Areas (RSAs). Lotteries had been held previously in these markets, but the winning applications had been found defective under the Commission's rules and dismissed. One of the dismissed applications was Florida Cellular Mobil Communications Corporation (Florida), captioned above. Florida sought reconsideration of the dismissal. Florida's petition was denied[1] and it filed a second petition for reconsideration, which was denied by the Commission in November 1991.[2] Then, on December 23, 1991, filed a third petition for reconsideration, which is pending. Florida is now requesting that the re-lottery for Market 468 be suspended until the Commission has acted on Florida's latest petition for reconsideration.

2. Florida claims that there are no public interest reasons for holding the April 8, 1992 lottery. According to Florida, because interim service for this market has been authorized, there is no pressing need to hold a new lottery. Whereas if another applicant is selected for the Maryland 2 RSA market, Florida says, the applicant will undoubtedly file untimely pleadings against Florida's petition for reconsideration that will further delay action on Florida's petition. Consequently, Florida submits that a new lottery would only waste the Commission's limited resources.

II. DISCUSSION

3. Florida has failed to make a sufficient showing to justify the extraordinary relief it seeks. It has not shown that it will suffer irreparable injury if the lottery takes place as scheduled. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). The lottery procedure neither constitutes, nor automatically results in, the grant of a construction permit. Rather, it initiates a process which will require some time before a construction permit is issued. Even after the process is completed, should Florida wish to challenge the grant of the construction authorization to the lottery winner, it may file a petition for reconsideration or an application for review. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The courts have recognized that license grants which are challenged by litigation are subject to that litigation and may be undone if the court reverses the grant. *See, e.g., Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976). Moreover, any construction authorization is conditioned on the outcome of any pending proceedings regarding the dismissal of prior lottery winners. Furthermore, Florida has failed to even tender any evidence, let alone prove, that it will suffer irreparable harm, as is required for the grant of a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). We further note that granting a suspension would harm both the public in general and the interested parties because a delay of the April 8, 1992 lottery would prevent expeditious permanent service to the public if Florida's latest petition for reconsideration is denied.

4. Accordingly, IT IS ORDERED that the "Motion for Suspension of April 8, 1992 Re-Lottery for Cellular Market No. 468, Maryland 2 - Kent" filed by Florida Cellular Mobil Communications Corporation (File No. 10854-CL-P-468-A-89) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *Florida Cellular Mobile Communications Corp.*, 6 FCC Rcd 354 (Mob. Ser. Div. 1991).

[2] *Florida Cellular Mobil Communications Corp.*, 6 FCC Rcd 691 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PROGRESSIVE CELLULAR III B-3 File No. 10570-CL-P-599-A-89

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 599, Oklahoma 4 - Nowata

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 1992; Released: March 16, 1992

By the Chief, Mobile Services Division:

I. BACKGROUND

1. On January 29, 1992, the Commission issued a Public Notice, Mimeo No. 21449, announcing that on April 8, 1992 the Commission would conduct lotteries to select winning cellular radio applications in twenty-nine Rural Service Areas (RSAs). Lotteries had been held previously in these markets, but the winning applications had been found defective under the Commission's rules and dismissed. One of the dismissed applicants was Progressive Cellular III B-3 (Progressive), whose application is captioned above. On January 6, 1992, Progressive filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit.[1] Progressive seeks to stay the non-wireline lottery for Market 599, pending the court's review of Progressive's dismissal.

2. Progressive claims that it will be irreparably harmed if the April 8, 1992 lottery is held. It states that if another applicant is selected for the Oklahoma 4 RSA market it will undoubtably seek to intervene as a party opponent in Progressive's court proceeding. This additional litigation, Progressive claims, will result in unnecessary expense that will not be recoverable.

II. DISCUSSION

3. Progressive has failed to make a sufficient showing to justify the extraordinary relief it seeks. It has not shown that it will suffer irreparable injury if the lottery takes place as scheduled. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm."). The lottery procedure neither constitutes, nor automatically results in, the grant of a construction permit. Rather, it initiates a process which will require some time before a construction permit is issued. Even after the process is completed, should Progressive wish to challenge the grant of the construction authorization to the lottery winner it may file a petition for reconsideration or an application for review. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The courts have recognized that license grants which are challenged by litigation are subject to that litigation and may be undone if the court reverses the grant. *See, e.g., Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976). Moreover, any construction authorization is conditioned on the outcome of any pending proceedings regarding the dismissal of prior lottery winners. There is, therefore, no basis for Progressive's assertion the Commission would be unable to provide it with adequate relief should it ultimately prevail on the merits. Accordingly, we conclude that Progressive has failed to demonstrate that it will suffer irreparable harm, as is required for the grant of a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). We further note that granting a stay would harm both the public in general and the interested parties because a delay of the April 8, 1992 lottery would prevent expeditious service to the public if Progressive's judicial appeal is denied.

4. Accordingly, IT IS ORDERED that the request for stay filed by Progressive Cellular III B-3 (File No. 10570-CL-P-599-A-89) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] *Progressive Cellular III B-3 v. FCC*, Case No. 92-1006.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONTEL OF VIRGINIA

Petition for Waiver of Section 36.125(f), Sections 36.154(e)(1) and (2), and the Definition of "Study Area" Contained in Part 36, Appendix-Glossary, of the Commission's Rules

NEW CASTLE TELEPHONE COMPANY AAD 90-18

Petition for Waiver of Section 69.605(c) and the Definition of "Study Area" Contained in Part 36, Appendix-Glossary, of the Commission's Rules

PEMBROKE TELEPHONE COOPERATIVE

Request for Interpretation of Commission Policies Regarding Study Area Boundaries

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1992; Released: March 23, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. Contel of Virginia (Contel), a wholly owned subsidiary of Contel Corporation; New Castle Telephone Company (New Castle), a wholly owned subsidiary of Telephone and Data Systems (TDS); and Pembroke Telephone Cooperative (Pembroke) have filed petitions seeking waivers of Part 36 and Part 69 of the Commission's Rules in conjunction with Contel's sale to New Castle of two telephone exchanges, and to Pembroke of one exchange.[1] On June 27, 1990, the National Exchange Carrier Association (NECA) filed comments in support of the New Castle petition. By public notice released July 9, 1990, 5 FCC Rcd 4044, we invited comments on all three submissions. On August 3, 1990, United States Telephone Association (USTA) and National Telephone Cooperative Association (NTCA) filed comments in support of these petitions.

2. The definition of study area contained in Part 36, Appendix-Glossary, of the Commission's Rules states that the study area boundaries shall be frozen as they were on November 15, 1984.[2] Contel seeks a waiver of this definition, in order to remove the Paint Bank, New Castle, and Newport exchanges from its existing Virginia study area.[3] New Castle seeks a waiver of the definition of study area in order to establish a new study area in Virginia for the Paint Bank and New Castle exchanges. Pembroke seeks a waiver of the definition of study area in order to add the Newport exchange to its existing Virginia study area. We grant these study area and related waiver requests.

3. New Castle also seeks a waiver of Part 69.605(c)[4] to allow it to convert its acquired exchanges to average schedule. As discussed herein, we will allow New Castle to operate on an average schedule basis.

II. ISSUE ANALYSIS

Study Area Waivers

4. The Commission's three primary concerns in relation to study area boundary change petitions are: (a) that the change does not have an adverse impact on the Universal Service Fund (USF) support program,[5] (b) that the state commission(s) having regulatory authority not oppose the change,[6] and (c) that the public interest is served.

Impact on USF Support

5. All three carriers state that there will be no impact on USF support if the waivers are granted. Contel bases its claim on a recalculation of its USF based on the remainder of its study area after the sale.[7] Pembroke,

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[1] Pembroke filed a request for an interpretation of study area boundaries, not a petition for waiver. The study area definition waiver that Pembroke requests can be granted only pursuant to a waiver request. However, because Pembroke's request is part of a transaction involving Contel, which did file a waiver petition, we will treat Pembroke's request as a joint filing with Contel's petition for waiver.

[2] 47 C.F.R. Part 36, Appendix-Glossary.

[3] Contel also requests a waiver of Section 36.154(e)(1) and (2) of the Commission's Rules relating to the computation of a Subscriber Plant Factor (SPF), and Section 36.125(f) relating to the composite interstate factor (dial equipment minutes, or DEMs) used in the separation of Local Switching Equipment - Category 3 (COE Category 3) investment for the transitional period through 1992.

[4] 47 C.F.R. §69.605(c) outlines the definition of, and payments to, average schedule companies.

[5] The Commission's primary objective in adopting the requirement that study area boundaries be frozen was to prohibit companies from setting up high cost exchanges within their existing service territories as separate companies to maximize high cost support. *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, Recommended Decision and Order, 49 Fed. Reg. 48325 (1984) (*Joint Board Order*) at para. 65.

[6] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990). The Commission describes the factors that led to the present restriction on study area changes, including the ability of LECs to manipulate high cost support, and the possibility of shifting costs between jurisdictions. The Commission has not yet acted on the proposals set forth in the *Notice*.

[7] Contel indicates that before the sale of the three exchanges, its study area had a total of 374,883 loops with an average loop cost of $272.21. After the sale, Contel contends that its revised study area will have 372,591 loops, with an identical average loop cost. It states that it received $13,521 per month in high cost support before the sale of the three exchanges, and it expects to receive approximately the same amount after the sale.

serving some 1,575 subscribers, states that its purchase of the Newport exchange will add approximately 575 subscribers to its customer base. Pembroke states that it currently receives no USF support and estimates that it will receive no USF support after the acquisition of the Newport exchange. New Castle states that it will not be entitled to any USF support.[8] Since the parties have stated that no part of this transaction will impact the high cost fund, our concerns in that regard are assuaged.

State Commission

6. On May 18, 1990, the State Corporation Commission for the Commonwealth of Virginia approved the changes under consideration here. Our concerns in this regard are thus resolved.

Public Interest

7. The public interest considerations involving this transaction are discussed more fully in the Average Schedule section, below. We find that the public interest will be served by grant of these waivers.

SPF and DEM Waivers

8. Contel requests waiver of Sections 36.154(e)(1) and (2), SPFs, and 36.125(f), DEMs. Contel provides calculations reflecting adjustments to frozen SPF data in the absence of the three exchanges; *see* Contel Petition, Exh. I. Contel also provides a newly developed composite allocator for DEMs, calculated for the revised Contel of Virginia study area. *See id.* We find Contel's calculations acceptable, and grant the requested waiver.

Request for Average Schedule Status

9. New Castle, a subsidiary corporation of TDS, was formed by TDS for the purpose of receiving two cost study exchanges that were owned by another holding company, Contel. In requesting a new, average schedule study area for these exchanges, New Castle states that it would be in the public interest to authorize a local exchange carrier of its size (1,550 access lines) to settle on the average schedules, which would permit it to avoid "the significant burdens and cost of settling on a cost basis."[9] New Castle further contends that its request for waiver of Section 69.605(c) of the Commission's rules, 47 C.F.R. § 69.605(c), to permit New Castle to become an average schedule company is consistent with the Commission's average schedule policy.[10] Finally, New Castle states that it lacks the "individualized information [that is necessary to produce a cost study]... and such records would be a major task to construct, particularly given the absence of individual historical operating data."[11]

10. Because of the potential that exists for carriers to inflate revenue requirements artificially, the Commission has only infrequently permitted exchange carriers to convert to average schedule status. However, we conclude that a waiver is in the public interest under the uniquely limited circumstances of this case. That conclusion is premised upon the following factors: (1) New Castle is a small telephone company (two exchanges, 1,550 access lines); (2) this transaction does not appear to be part of a pattern of asset transfers between TDS and Contel, or among TDS, Contel, or any other exchange carrier, designed to materially increase interstate revenue requirements, or having that effect; (3) the effect upon interstate revenue requirements is, and is likely to be, *de minimis;* and (4) New Castle has stated that USF revenue requirements will not increase.

11. Average schedule status has certain advantages for small telephone companies and for interstate ratepayers. Average schedule companies are able to avoid certain administrative burdens, and interstate ratepayers are not required to pay the expenses that exchange carriers incur in the performance of interstate cost studies. However, the Commission has concluded that an unrestricted opportunity for cost companies to convert to average schedule status is likely to operate to the detriment of interstate ratepayers. Because average schedule companies can always convert to cost, there is the danger that:

> a cost company that receives sufficient depreciation will eventually find it profitable, *ceteris paribus*, to convert to the average schedules because of the concomitant reduction to its rate base. We do not believe that it would be sound to permit exchange carriers to receive the windfall that would result if they were permitted to elect to depreciate plant to the "cross over" point and then receive average schedule treatment.[12]

12. Reclassification of assets from cost study basis to average schedule settlements status can inflate interstate revenue requirements. By purchasing or selling regulated assets as portions of study areas, exchange carriers can manipulate, and increase, compensation that is received under the Commission's rules without any corresponding benefit to the carrier's customers. This is particularly true where asset transfers increase the average loop cost of the transferor or the transferee for USF support calculations, or where interstate cost study revenue requirements are less than average schedule settlements.[13]

13. Under certain unusual and limited circumstances, the Commission has permitted cost companies to convert to average schedule status. In the *Papago Order*, a tribe of Native Americans, without any experience in operating a

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[8] New Castle states that as an average schedule company it will not be eligible for any high cost support, based on NECA's statistical average schedule subscriber loop cost methodology.

[9] Newcastle Petition at 2-3.

[10] *Id.* at 3-5, *citing* NECA's Proposed Waiver of Section 69.605(c) of the Commission's Rules, 2 FCC Rcd 3960 (Com.Car.Bur. 1987) (*5,000 Lines Waiver Order);* Papago Tribal Utility Authority, Memorandum Opinion and Order, 2 FCC Rcd 6631 (Com.Car.Bur. 1987) (*Papago Order);* Pooling Status of LECs Involved in Mergers or Acquisitions, CC Docket No. 89-2, 5 FCC Rcd 231 (1989) (*Mergers and Acquisitions Order).*

[11] Newcastle Petition at 3.

[12] *5,000 Lines Waiver Order*, 2 FCC Rcd at 3960.

[13] Transferring lower cost loop plant to another exchange carrier can result in increased USF compensation, increased revenue requirements, and increased rates for the transferror. *See, e.g.*, 47 C.F.R. § 36.631-36.641. Transferring higher cost loop plant to another exchange carrier can also result in increased USF compensation, increased revenue requirements and increased rates for the transferee. *Id.* If the low cost loop plant is transferred to an average schedule company, increased settlements, revenue requirements, and rates may also result.

telephone company or in complying with Commission cost study practice, was granted a waiver to operate a small exchange area as an average schedule company. In the *5,000 Lines Waiver Order*, the Commission gave certain small cost companies a limited, one-time opportunity to elect to convert to average schedule status.

14. We are not persuaded by New Castle's contention that previous FCC orders require us to grant its waiver request. We reject New Castle's contention that the *Papago Order*'s limited waiver was granted under circumstances that are closely analogous. The circumstances surrounding the New Castle and Papago waiver requests are markedly different. In the New Castle/TDS case, TDS has considerable experience in interstate cost of service regulation and telephone company operations. In the *Papago Order*, the Papago Tribal Utility Authority, a subsidiary organization of the Tonono O'odham Nation, was embarking upon the task of "starting and building up its telephone operations," an activity in which it lacked operating experience as well as experience in complying with FCC regulatory requirements.[14] The limited waiver granted in the *5,000 Lines Waiver Order* was based upon the fact that the average schedules had not been updated with sufficient frequency from 1970 through December 1, 1982 to reflect rapidly increasing costs. Since Section 69.606(b) requires annual assessments of the adequacy of the average schedule formula, the Commission gave companies that had converted to cost a one-time opportunity to convert to average schedule status.[15]

15. However, we believe a limited waiver in this case would serve the public interest, without undue risk to interstate ratepayers, because of the potential reduction in expenses associated with not requiring cost studies. There is no indication that TDS contemplates further exchanges of assets (below the study area level), or further requests for waiver of study area boundaries or average schedule status, that would trigger the need for a comprehensive investigation, and there are potential savings to ratepayers from not requiring that cost studies be performed in this case.

16. We are concerned that our approval of the study area change requested here, along with a waiver to convert the acquired cost assets to average schedule status, could be misconstrued as giving the "green light" to exchange carrier asset transfers that increase interstate revenue requirements. We emphasize that we grant this waiver only because the interstate revenue requirement impact of the waivers requested here is truly *de minimis*. Each waiver request is reviewed to ascertain whether it, or it in combination with prior waiver requests, will have a material effect on interstate revenue requirements. If we perceived such effect, we would likely undertake a thorough investigation of average schedule changes to evaluate its extent. In this case, however, such an investigation does not seem necessary.

17. Under these limited circumstances, we believe approving New Castle's waiver request is in the public interest. We note that any future request for waiver of Section 69.605(c), of a similar or related nature, must be thoroughly documented, and must clearly demonstrate that interstate revenue requirements, tariffed rates, and settlements will not increase as a consequence of the requested action.

III. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the petitions of Contel of Virginia and New Castle Telephone Company for waiver of the definition of "study area" set forth in Part 36, Appendix-Glossary of the Commission's Rules, and the request for interpretation of Pembroke Telephone Cooperative ARE GRANTED.

19. IT IS FURTHER ORDERED that the petition of Contel of Virginia for waiver of Sections 36.125(f) and 36.154(e)(1) and (2) of the Commission's Rules IS GRANTED.

20. IT IS FURTHER ORDERED that the petition of New Castle Telephone Company for waiver of Section 69.605(c) of the Commission's Rules IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

[14] Papago Tribal Utility Authority Petition for Waiver (filed July 17, 1987) at 2. The *Mergers and Acquisitions Order* is also inapposite. That Order involved issues that had been raised by the Commission's decision to permit exchange carriers to elect to withdraw from the NECA administered interstate revenue pool. The *Mergers and Acquisitions Order* did not alter or grant a waiver of Section 69.605(c), 47 C.F.R. § 69.605(c).

[15] *5,000 Lines Waiver Order*, 2 FCC Rcd at 3960; 47 C.F.R. § 69.606(b). Other reasons were also considered in granting that waiver. *Id.* at 3960-61.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TTX Company,
Complainant,

v. File No. IC-90-04823

AT&T Communications,
Defendant.

ORDER

Adopted: March 17, 1992; Released: March 23, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On June 5, 1990, TTX Company (TTX)[1] filed with the Commission the above-captioned informal complaint against AT&T Communications (AT&T). In its complaint, TTX states that sometime before March 31, 1990, TTX was victimized by toll fraud as a result of unknown computer hackers accessing and using its telephone system. TTX alleges that AT&T is violating Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), by attempting to collect from TTX the unauthorized charges associated with this usage despite giving no warning in its tariff that TTX would be held responsible for such charges. On September 5, 1990, AT&T filed a report in accordance with Section 1.717 of the Commission's rules, 47 C. F. R § 1.717, which generally denies any violation of the Communications Act or the Commission's rules.

2. In a letter dated September 18, 1991, TTX was notified by the Commission that it was "not prepared, on its own motion, to recommend further Commission action." On September 19, 1991, TTX filed a request for waiver of Section 1.718 of the Commission's rules, 47 C.F.R. § 1.718, which provides, *inter alia*, that a complainant will be deemed to have abandoned its informal complaint if a formal complaint is not filed within six months of the date of the carrier's report. Because the defendant's report in this proceeding was filed on March 26, 1991, TTX could be considered to have abandoned its complaint as of September 26, 1991. In support of its waiver request, complainant indicates that issues central to its complaint are currently pending in related proceedings. *See Pacific Mutual Life Insurance Company* (File No. ENF-91-07), and *Chartways Technology v. AT&T Communications* (File No. E-88-72)[2] The complainant argues that in as much as the outcome of these proceedings may serve as precedent for the subject complaint, it would be unfair to require the complainant to incur potentially unnecessary expenses in filing a formal complaint before September 26, 1991, solely to preserve its rights. The waiver request is unopposed.

3. Section 1.717 of the rules provides that where a complainant is not satisfied by the carriers' report and the Commission's disposition of the informal complaint, the complainant may file a formal complaint in accordance with Section 1.717 of the Commission rules, 47 C.F.R. § 1.721. Together, Sections 1.717 and 1.718 provide a complainant whose informal complaint has not been satisfied through the informal complaint process the opportunity to pursue further its claims by filing a formal complaint which might otherwise be barred by the two year statute of limitations contained in Section 415 of the Communications Act.[3] The rules are also intended to ensure finality to a controversy within a time certain if no formal complaint is filed. In the instant case, since the carrier's report does not appear to have satisfied the complainant, Section 1.718 would have required the complainant to file a formal complaint by September 26, 1991 in order to continue to pursue its claim.

4. Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, provides that the rules may be waived for good cause. In the instant case, we are not persuaded that Commission action on *Pacific Mutual* is necessary to a full and fair resolution of TTX's claim. We see no reason to delay action on TTX's claim pending resolution of a petition looking towards the possible establishment of Commission rules and policies of general applicability. Similarly, we are not persuaded that action on the pending application for review of the Bureau's *Chartways* decision is a condition precedent to resolution of this complaint. However, since the deadline for filing a formal complaint based on an unsatisfied informal complaint has expired, we will grant a waiver of 47 C.F.R. § 1.718 to the extent that the complainant will have 60 days from the release of this Order to file a formal complaint, should it elect to do so.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the request for waiver of Section 1.718 of the Rules, 47 C.F.R. § 1.718, filed by TTX Company IS GRANTED to the extent indicated in paragraph 4 *supra*, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

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[1] At the time this complaint was filed, complainant was doing business as Trailer Train Company.

[2] 26 FCC Rcd 2952 (Com. Car. Bureau 1991), *applic. for rev.* and *pet. for stay* pending.

[3] 47 U.S.C. § 415.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-92-063

Application for authority pursuant to Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to interconnect Inmarsat Standard C facilities with the packet data network of US Sprint Communications Company

ORDER AND AUTHORIZATION

Adopted: March 12, 1992; Released: March 23, 1992

By the Chief, International Facilities Division:

1. On December 11, 1991, the Communications Satellite Corporation, Mobile Communications division (Comsat), filed the above-captioned uncontested application pursuant to Section 504(c)(3) of the International Maritime Satellite Telecommunications Act (Inmarsat Act) and Section 214 of the Communications Act of 1934, as amended. Comsat requests authority to interconnect its Inmarsat Standard C facilities with the X.25 packet data network (PDN) of US Sprint Data Division (Sprint), a division of US Sprint Communications Company, for the provision of Comsat's authorized Inmarsat Standard C services.

2. Comsat states that Inmarsat Standard C service is a digital, message-based store and forward communications system that allows users to access the Inmarsat system via small, low-cost mobile terminals. Comsat currently has authority to provide Inmarsat Standard C maritime services, but does not have authority to provide such service to aeronautical or land mobile customers.[1] Comsat and Sprint entered into an agreement to interconnect the Sprint PDN with Comsat's Southbury, Connecticut, (WA-28) and Santa Paula, California, (KA-31) coast earth stations and the Comsat international telex switch located in Washington, D.C. This will allow the exchange of Inmarsat standard C data transmissions between mobile earth terminals in the Inmarsat Atlantic Ocean-East, Atlantic Ocean-West, and Pacific Ocean Regions and the various U.S. and overseas points Sprint serves. Comsat also states that at present Inmarsat Standard C users are limited to sending telex-type messages. According to Comsat, interconnection with Sprint's PDN will allow Inmarsat standard C users to send more complex messages using a personal computer keyboard and enable Comsat to provide higher quality Inmarsat Standard C services to its customers at a reduced cost. Moreover, Sprint's PDN will serve as the primary interconnect with the U.S. Coast Guard, Defense Mapping Agency, and National Weather Service as part of the Global Maritime Distress and Safety Service.

3. Comsat states that the terms and conditions of the Comsat/Sprint agreement are similar in material respects to other mobile satellite service interconnection agreements entered into by Comsat, and are fully consistent with all pertinent Commission rules and policies. Comsat further states that the charges to customers for Comsat services using the Sprint X.25 PDN will be in accordance with the applicable Comsat tariffs. Comsat further agrees to perform all accounting activities in the manner specified under Comsat's Commission-approved accounting procedures.

4. The Inmarsat Act provides for an overall operational scheme for extending maritime satellite services within the United States. The Act permits only Comsat to own and operate the United States share of jointly-owned international space segment and ancillary facilities established to provide maritime satellite services. It provides that Comsat may own and operate satellite earth stations in the United States, but that the Commission may authorize ownership of earth stations by entities other than Comsat if a determination is made that such additional ownership will enhance the provision of maritime satellite services in the public interest. The Act specifically requires Comsat to interconnect its earth stations with the facilities and services of United States domestic and international carriers, as authorized by the Commission.[2] In recognition of the fact that maritime satellite services in the United States would be an extension of existing communications services offered on a competitive basis by a number of carriers, and that these carriers would provide customer access to the satellite system by means of their on-shore networks, the Commission adopted a general policy permitting any United States domestic or international carrier to seek authorization to provide terrestrial access to the maritime satellite system by direct interconnection with Comsat.[3] The Commission noted that exclusive arrangements for exchange of traffic between Comsat and shore-end carriers would reduce the competitive pick up and delivery of traffic and impair customer choice: thus, it required Comsat to accord shore-end carriers nondiscriminatory treatment with respect to terms of interconnection and exchange of traffic.[4]

5. Upon review of the subject application and interconnection agreement, we find that grant of the application will service the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED that application File No. I-T-C-92-063 IS GRANTED, and Comsat is authorized to interconnect its Inmarsat Standard C facilities with Sprint's X.25 packet data network.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See Communications Satellite Corp.*, 6 FCC Rcd 5765 (1991).

[2] Section 503(g) of the Act requires the Commission to determine the operational arrangements under which Comsat will interconnect with United States domestic or international carriers, and with private communications systems, for the purpose of extending maritime satellite service.

[3] *Implementation of Requirements of the International Maritime Satellite Communications Act*, 71 FCC 2d 1069 (1979).

[4] *See* 71 FCC 2d at 1081.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-298

In re Applications of

BETH KNIGHT	File No. BPH-880516MA
LUCINDA FELICIA PAULOS	File No. BPH-880518MB
BODEGA COMMUNICATIONS, INC.	File No. BPH-880519MD
JOHN A. CAROLLO, JR.	File No. BPH-880519MX
MANZANITA MEDIA, INC.	File No. BPH-880519NR

For Construction Permit for
New FM Station, Channel 229A,
Sebastopol, California

ERRATUM

Released: March 23, 1992

The *Memorandum Opinion and Order*, FCC 92R-23, adopted March 2, 1992 and released March 12, 1992, IS CORRECTED to show the MM Docket No. 90-298 in lieu of MM Docket No. 90-248.

BY DIRECTION OF THE REVIEW BOARD

Allan Sacks
Chief for Law

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

PJB COMMUNICATIONS OF VIRGINIA, INC. File No. 63500-89-10-JSG

Notice of Apparent Liability for Forfeiture Penalty for Stations KPE333 and KPE335 in the Public Land Mobile Service at Northern Virginia

PJB COMMUNICATIONS, INC. File No. 63500-89-11-JSG

Notice of Apparent Liability for Forfeiture Penalty for Station KPE333 in the Public Land Mobile Service at Maryland

MEMORANDUM OPINION & ORDER

Adopted: March 12, 1992; Released: March 23, 1992

By the Commission:

I. INTRODUCTION

1. In this order, we address an Application for Review filed jointly by PJB Communications of Virginia, Inc. (PJBVA) and PJB Communications, Inc. (PJB) requesting remission or reduction of forfeitures totaling $8,000 which were imposed by the Mobile Services Division (MSD). For the reasons discussed below, we deny the Application for Review.

II. BACKGROUND

2. On December 16, 1988, PJBVA filed a request for reinstatement of authorizations for five one-way paging facilities for Stations KPE333 and KPE335 in Northern Virginia. Also on December 16, 1988, PJB filed a request for reinstatement for three of its one-way paging facilities for Station KPE333 in Maryland. Both companies requested reinstatement because they failed to file FCC Form 489, notifying the Commission of completion of construction, for each station as required to keep their authorizations in force by Section 22.9(b)(1) of the Commission's rules.[1] The companies were operating the stations for anywhere from six months to one year without having filing the required notifications. As a result, on March 16, 1989, the MSD issued a Notice of Apparent Liability (NALF) to PJBVA for $5,000 and issued an NALF to PJB for $3,000. PJBVA and PJB filed a consolidated request for remission or reduction of the forfeitures.[2] The MSD denied the request and upheld the two forfeitures. *See PJB Communications of Virginia, Inc.*, 5 FCC Rcd 6241 (1990) (*MSD Order*). The assessed forfeitures predated the statutory increases in the Commission's forfeiture authority. *See* Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (signed into law December 19, 1989).

3. In their Application for Review, PJBVA and PJB argue that the MSD did not consider their claim that the public interest was not harmed as a result of the rule violations. They maintain that station operations actually have benefited the public interest by permitting continued services to health care professionals, state and county police, and other businesses. They also assert that the MSD did not follow precedents concerning inadvertent rule violations. Additionally, PJBVA and PJB claim that their voluntary disclosure of the violation and flawless Commission record in consistently operating in full compliance with Commission rules and requirements were not addressed by the MSD, whereas such factors have been controlling in other cases.

4. PJBVA and PJB also argue that the MSD summarily rejected the companies' economic-hardship showing despite their submitting detailed financial information demonstrating otherwise. They claim the MSD incorrectly focused on their combined gross revenues of $395,469 and $23,573 for the years ending April 30, 1988 and 1987, respectively, instead of properly focusing on their combined net losses of $1,008,146 and $511,271, respectively. PJBVA and PJB further contend that the MSD should also have focused on an April 1989 letter from their independent CPA firm estimating continuing losses of an additional $200,000 for the year ending December 31, 1988. Moreover, they now submit updated financial information for the year ending December 31, 1989, and say that they lost, in combination, $2,159,952.

III. DISCUSSION

5. After carefully reviewing the facts and PJBVA and PJB's assertions, we deny the request for cancellation or reduction of the forfeitures. By their own admission, the authorizations of PJBVA and PJB inadvertently lapsed. The fact that a licensee's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew it was doing the act in question. *See Southern California Broadcasting* Co., 6 FCC Rcd 4387 (1991). By their own admissions, PJBVA and PJB were operating the facilities on a continuous basis without having filed the required notifications for six months to one year in violation of Section 22.9(b)(1). While inadvertence can be a basis for lowering a forfeiture, we believe the amounts of these forfeitures are not inappropriate for inadvertent violations.

6. We also reject the argument that we should lower the forfeitures because the rule violations did not adversely affect the public interest in terms of service received. As licensees, PJBVA and PJB were required to operate in accordance with Commission rules and the terms of their authorizations and, thus, they can not absolve themselves of their duty to do so simply by claiming that continued provision of services did not harm the public interest in terms of service received. There is an independent public interest in licensees complying with the rules. *See Union Broadcasting Corp.*, 52 FCC 2d 387 (1975).

7. We also find unavailing the assertion that the MSD did not sufficiently address the fact that PJBVA and PJB voluntarily disclosed their violations and their Commission record regarding compliance. It is readily apparent

that these factors were already taken into consideration in setting the proposed fines in view of the relatively low forfeitures that were imposed. PJBVA and PJB operated a total of eight facilities for anywhere from six months to one year in violation of Section 22.9(b)(1). Based upon the number and duration of the violations, a total of $8,000 in forfeitures is not unduly harsh. In fact, they are very low, if not too low, for such violations.

8. We also reject PJBVA and PJB's economic-hardship arguments, and we find the MSD's use of gross revenues in assisting it to determine the parties' ability to pay is both reasonable and appropriate and, moreover, a very useful yardstick in helping to analyze a company's financial condition for forfeiture purposes.[3] The parties' reliance on *Tri-County Telephone Co., Inc.*, 54 Rad. Reg. 2d (P&F) 1065 (Com.Car.Bur. 1983) (*Tri-County*), and *Canby Telephone Association*, 5 FCC Rcd 731 (Com.Car.Bur. 1990) (*Canby*), is misplaced. In *Tri-County*, where the forfeiture was reduced from $3,650 to $200, there was a $414.62 net profit for 1982 but there was nothing mentioned as to Tri-County's revenues.[4] In *Canby*, the revenue was only $861, and because Canby demonstrated that its ability to serve the public could be affected by the amount assessed, the forfeiture was reduced from $2,630 to $600. By contrast, we do not find that $8,000 in forfeitures is excessive when compared to combined gross revenues of $395,469 (as of April 30, 1988). The $8,000 forfeiture is approximately 2.02 percent of $395,469 and is, therefore, a relatively small amount of money for these licensees. We also conclude that the MSD properly considered the CPA's April 1989 letter by specifically noting, ". . . an assertion of expected losses without more is too general to support the parties' request for cancellation or remission." *MSD Order*, *supra*, at 5 FCC Rcd 6242. Moreover, and contrary to their statement, PJBVA and PJB have not demonstrated that the $8,000 in forfeitures would threaten continued provision of service to the public. In general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture. Nevertheless, we recognize that in some cases, other financial indicators, such as net losses, may also be relevant. If gross revenues are sufficiently great, however, the mere fact that a business is operating at a loss does not by itself mean that it cannot afford to pay a forfeiture.

9. Turning our attention to the parties' 1989 unaudited financial statements submitted with the Application for Review, we note that their combined gross revenue is now up to $1,055,140. We do not believe that forfeitures for both companies together totaling $8,000 are excessive when viewed against this gross revenue figure.

10. As a result of the foregoing, we conclude that the arguments of PJBVA and PJB are insufficient to justify cancellation or reduction of the forfeitures and, thus, affirm the *MSD Order* upholding the $5,000 forfeiture assessed against PJBVA and the $3,000 forfeiture assessed against PJB.

IV. ORDERING PARAGRAPHS

11. Accordingly, IT IS ORDERED that the Application for Review filed jointly by PJB Communications of Virginia, Inc. and PJB Communications IS DENIED.

12. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), that PJB Communications of Virginia, Inc. SHALL FORFEIT to the United States the sum of Five Thousand Dollars ($5,000) and that PJB Communications, Inc. SHALL FORFEIT to the United States the sum of Three Thousand Dollars ($3,000), for willful and repeated violations of Section 22.9(b)(1) of the Commission's rules. Payment of the forfeitures may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission within thirty (30) days from the date of this Order, at: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

13. IT IS FURTHER ORDERED that if said forfeitures are not paid within the period specified, the cases will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 504(a).

14. IT IS FURTHER ORDERED that a copy of this Order BE SENT to PJB Communications Inc. of Virginia, Inc. and PJB Communications, Inc. by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 22.9(b)(1) provides:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

[2] PJBVA and PJB are affiliated companies with the same corporate structure, officers, directors, and shareholders; and the facilities in question are part of the same integrated, one-way paging network owned and operated by both companies.

[3] The exact affiliation between PJBVA and PJB is not stated other than as described in n.2, *supra*. Therefore, because there is nothing before us indicating whether there is, *e.g.*, a parent-subsidiary or sister-sister relationship between PJBVA and PJB and because the companies presented financial data only on a combined basis, we deem it appropriate, as was done by the *MSD Order*, to reference the $8,000 collectively in forfeitures in relation to PJBVA and PJB's combined gross revenues.

[4] To the extent that *Tri-County* suggests that focus on profit alone is an appropriate basis for a financial hardship showing, it is hereby overruled.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the

Applications of

AMERICAN MOBILE SATELLITE CORPORATION — File No. 420-DSE-P/L90

For Blanket License for 30,000 Mobile Earth Stations

ROCKWELL INTERNATIONAL CORPORATION — File No. 933-DSE-P/L90

For Blanket License for 15,000 Mobile Earth Stations

GEOSTAR MESSAGING CORPORATION — File No. 2306-DSEP/L-89

For Blanket License for 10,000 Mobile Earth Stations In the 1530-1544 MHz (downlink) and 1626.5-1645.5 (uplink) Bands

COMMUNICATIONS SATELLITE CORPORATION - WORLD SYSTEMS DIVISION — File No. I-T-C-90-038

For authority pursuant to Section 214 of the Communications Act of 1934, to establish and operate communications channels via the INMARSAT system using a MARISAT satellite and an earth station at Southbury, Connecticut (WB-36) for interim use by the authorized domestic mobile satellite service (MSS) carrier in its provision of domestic MSS services

ORDER

Adopted: March 18, 1992; Released: March 23, 1992

By the Chief, Domestic Facilities Division:

1. Aeronautical Radio, Inc. (ARINC) has filed a Motion for Extension of Time in which to submit comments on a petition for partial reconsideration of the *Order and Authorization*, 7 FCC Rcd 942 (1992), in the above-referenced proceedings. AMSC Subsdiary Corporation (AMSC) filed a Petition for Partial Reconsideration on March 5, 1992. In its motion, ARINC requests that the date for comments to AMSC's petition be extended from March 19 to March 24, 1992.

2. In support of this request, ARINC indicates that AMSC filed a petition for partial reconsideration in a related proceeding [*Aeronautical Radio, Inc. and the Air Transport Association of America*, 7 FCC Rcd 1006 (1992)] on March 9, 1992. Comments on this proceeding are due on March 24, 1992. Grant of this motion would enable ARINC to file a consolidated pleading addressing the merits of both petitions. In addition, ARINC indicates that AMSC has stated that it has no objection to the requested extension.

3. A brief extension to consolidate the filing dates is in the public interest and will not delay consideration of AMSC's petition. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, IT IS ORDERED that Aeronautical Radio, Inc.'s Motion for an Extension of Time IS GRANTED. The date for filing comments is extended from March 19, 1992 to March 24, 1992.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-490

In the Matter of

Amendment of Section 73.202(b),	RM-6400
Table of Allotments,	RM-6623
FM Broadcast Stations.	
(Parker and Lake Havasu City, Arizona)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1992; Released: March 24, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 3 FCC Rcd 6130 (1988), proposing the substitution of Channel 257C2 for Channel 257A at Parker, Arizona, and the modification of the license of Station KMDX, Parker, Arizona, to specify operation on Channel 257C2. KMDX-FM99, Inc. ("KMDX") filed comments and reply comments. Payne-Presott Broadcasting Company, Inc. ("Payne-Prescott") filed comments and reply comments. Scofield Broadcasting Company, Inc. ("Scofield") filed a counterproposal and reply comments. Finally, KMDX filed comments directed to the Scofield counterproposal and supplemental comments. For the reasons discussed below, we are upgrading Station KMDX to specify operation on Channel 257C2 and allotting Channel 224C2 to Lake Havasu City, Arizona, as a new local service.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by KMDX-FM99, Inc., licensee of Station KMDX, Parker, Arizona, proposing the Channel 257C2 upgrade for Station KMDX. In response to the *Notice*, Scofield Broadcasting Company, Inc. filed a counterproposal proposing the allotment of Channel 257C2 to Lake Havasu City, Arizona, as a new local service.[2] Payne-Prescott Broadcasting Company, Inc., licensee of Station KNOT-FM, Prescott, Arizona, filed comments with respect to the reference coordinates for the proposed Channel 257C2 allotment at Parker, Arizona. As noted by Payne-Prescott, we granted Station KNOT-FM a Channel 256C upgrade in MM Docket No. 84-512. In its comments in this proceeding, Payne-Prescott requests that we protect both the reference coordinates for its Channel 256C allotment and the coordinates proposed in its application (File No. BPH-860709IC) to implement the Channel 256C upgrade.

3. After careful consideration of this matter, we are allotting Channel 224C2 to Lake Havasu City, Arizona.[3] This alternate allotment enables us to upgrade Station KMDX to specify operation on Channel 257C2.[4] We believe that both a new local FM service at Lake Havasu City and an upgraded FM service at Parker would serve the public interest. Since both Lake Havasu City and Parker, Arizona, are located within 320 kilometers of the U.S. Mexican border, Mexican concurrence has been obtained for these allotments.

4. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, That effective **May 8, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Parker, Arizona	257C2
Lake Havasu City, Arizona	224C2, 266C, 283C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of FM Station KMDX, Parker, Arizona, IS MODIFIED to specify operation on Channel 257C2 in lieu of Channel 257A, subject to the following conditions:

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[1] Lake Havasu City has been added to the caption.

[2] Public Notice was given on December 20, 1988, (Report No. 1763). In a separate matter, we will not consider a proposed Channel 224C1 allotment for Lake Havasu City or Parker, Arizona, set forth by Scofield in reply comments. Section 1.420(d) of the Commission's Rules requires that counterproposals be advanced in initial comments. Unlike the situation that existed in *Pensacola, Florida et al*, 2 FCC Rcd 1290 (1987), there was no indication in the underlying *Notice* in this proceeding or the Public Notice announcing the acceptance of the Lake Havasu City counterproposal that we would consider a higher class of channel for Lake Havasu City or Parker.

[3] The reference coordinates for the Channel 224C2 allotment at Lake Havasu City, Arizona, are 34-29-02 and 114-19-18. In a related context, we note, contrary to the argument advanced by KMDX, there is no requirement that a proponent of a counterproposal demonstrate that there is no alternative channel that would accommodate its proposed allotment. We also reject the KMDX argument that the Scofield counterproposal is defective because Scofield did not commit itself to construct the proposed facility. We believe that implicit in the Scofield commitment to file an application for the proposed allotment is a corollary commitment to construct the authorized facilities if granted a construction permit.

[4] The reference coordinates for the Channel 257C2 allotment at Parker, Arizona, are 34-07-22 and 114-12-40. In this regard, it is no longer necessary to consider the Payne-Prescott comments. The application to implement its Channel 256C upgrade was dismissed on February 7, 1989. Subsequently, on December 20, 1991, we granted a construction permit downgrading Station KNOT-FM to specify operation on Channel 256A (File No. BPH-910903IB). As a result of that action, the site for the Channel 256A allotment at Prescott would not affect the Channel 257C2 upgrade at Parker.

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (FCC Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the the Commission's Rules; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the filing window for the Channel 224C2 allotment at Lake Havasu City, Arizona, will open on **May 11, 1992,** and close on **June 10, 1992.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-621

In the Matter of

Amendment of Section 73.202(b), RM-7063
Table of Allotments,
FM Broadcast Stations.
(Kerrville, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1992; Released: March 24, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Guadalupe Communications, Inc. ("petitioner"), permittee of Station KITE-FM, Channel 221A, Kerrville, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 72 (1990), proposing the substitution of Channel 222C2 for Channel 221A at Kerrville and modification of Station KITE-FM's construction permit to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. Griffin Broadcasting Corporation ("Griffin"), licensee of Station KRVL-FM, Kerrville, Texas, filed comments. Petitioner filed a motion to accept responsive comments to Griffin's reply comments.[1]

2. Griffin states that Station KITE-FM has yet to be built and contends that petitioner "is using the rule making proceeding as a means of extending its unbuilt permit." In addition, Griffin asserts that petitioner has provided incorrect information regarding the tower that Station KITE-FM proposes to use.[2] In reply to Griffin's concerns, petitioner reiterates its intention to file an application for a Class C2 facility and construct the facility if authorized to do so. Petitioner states that there is a large area in which to locate the tower and it need not show that it has actual assurance of a particular site at this stage. In addition, petitioner provided the Commission with documentation clarifying its usage of the above-noted tower.[3]

3. Based on the record before us, we believe that the public interest would be served by substituting Channel 222C2 for Channel 221A at Kerrville, since it could enable Station KITE-FM to expand its coverage area. We find that Griffin has not submitted sufficient information to raise a substantial and material question regarding petitioner's motives in requesting this upgrade.

4. Channel 222C2 can be allotted to Kerrville in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3.0 miles) northwest to accommodate petitioner's desired site.[4] Since Kerrville is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained for this allotment. As proposed, we will also modify Station KITE-FM's construction permit to specify operation on Channel 222C2 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 8, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Kerrville, Texas	222C2, 232C2

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit for Station KITE-FM, Kerrville, Texas, IS MODIFIED to specify operation on Channel 222C2, in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

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[1] Although the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period, we will accept these comments in the interest of compiling a full record in this proceeding.

[2] Griffin submits a letter from James M. Butler, General Manager of Times Mirror Cable Television of Kerrville, dating March 13, 1990, denoting Mr. Butler's concerns regarding Station KITE-FM's vertical plan sketch that is associated with the station's application to modify its construction permit.

[3] Petitioner includes a letter from Mr. Butler, dating March 26, 1990, outlining Station KITE-FM's antenna construction plans.

[4] The coordinates for Channel 222C2 at Kerrville are North Latitude 30-05-00 and West Longitude 99-10-00.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-54

In the Matter of

Amendment of Section 73.202(b), RM-7937
Table of Allotments,
FM Broadcast Stations.
(North Madison, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 12, 1992; Released: March 24, 1992

Comment Date: May 15, 1992
Reply Comment Date: June 1, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Lakeshore Broadcasting ("petitioner") requesting the allotment of Channel 229A to North Madison, Ohio, as the community's first local aural transmission service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 229A to North Madison, Ohio, since an interest has been expressed in providing the community with its first local FM transmission service. Channel 229A can be allotted to North Madison in compliance with the Commission's minimum distance separation requirements with a site restriction of 9 kilometers (5.6 miles) west-southwest to avoid short-spacings to Station WZAK, Channel 226B, Cleveland, Ohio, and Station WBZZ, Channel 229B, Pittsburgh, Pennsylvania.[1] The site restriction imposed on Channel 229A at North Madison does not eliminate the short-spacings to Station CBCL-FM, Channel 228C1, London, Ontario, and Station CKLW-FM, Channel 230C1, Windsor, Ontario, Canada. However, we have confirmed that a North Madison station can limit its power in the direction of London and Window to avoid prohibited overlap with these stations. Since North Madison is located within 320 kilometers (200 miles) of the U.S.-Canadian border, we have requested Canadian concurrence in the allotment as a specially negotiated allotment.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
North Madison, Ohio	--	229A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 15, 1992,** and reply comments on or before **June 1, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Edward A. Sumrada
Lakeshore Broadcasting
2634 River Road
Willoughby Hills, Ohio 44094
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 229A at North Madison are North Latitude 41-47-31 and West Longitude 81-09-41.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-55

In the Matter of

Amendment of Section 73.202(b), RM-7939
Table of Allotments,
FM Broadcast Stations.
(Quincy, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 12, 1992; Released: March 24, 1992

Comment Date: May 15, 1992
Reply Comment Date: June 1, 1992

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of John K. LaRue ("petitioner"), permittee of Station KSPY(FM), Channel 262A, Quincy, California (BPH-890313MR), requesting the substitution of Channel 262C3 for Channel 262A and modification of his construction permit accordingly to specify operation on the higher powered channel. Petitioner failed to state his intention to apply for Channel 262C3 if allotted to Quincy, and is requested to do so in his comments.

2. We believe the public interest would be served by proposing the substitution of Channel 262C3 for Channel 262A at Quincy, since it would provide an enhanced service to the community. Channel 262C3 can be allotted to Quincy at the petitioner's suggested site, located 13 kilometers (8.1 miles) north of the community[1] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. We shall propose to modify the construction permit issued to the petitioner for Station KSPY(FM) at Quincy, California. Since the modification request complies with the provisions of Section 1.420(g) of the Commission's Rules, we will not entertain competing expressions of interest in the use of Channel 262C3 at Quincy, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. Accordingly, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

City	Channel No. Present	Proposed
Quincy, California	240A, 262A, 271C2	240A, 262C3 271C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 15, 1992,** and reply comments on or before **June 1, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Neal J. Friedman, Esq.
Pepper & Corazzini
Suite 200
1776 K Street, N.W.
Washington, D.C. 20006

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates for requested Channel 262C3 at Quincy are 40-02-41 and 120-53-04.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-510

In the Matter of

Amendment of Section 73.202(b),	RM-7491
Table of Allotments,	RM-7496
FM Broadcast Stations.	RM-7682
(Taylorville, Virginia and Augusta,[1] Illinois)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 13, 1992; Released: March 24, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 5 FCC Rcd 6553 (1990) (*"NPRM"*), issued in response to two mutually exclusive petitions for rule making. The first petition, filed on behalf of USA Radio Corporation ("USA"), licensee of Station WTJY(FM), Channel 224A, Taylorville, Illinois, requests the substitution of Channel 224B1 for Channel 224A and modification of its license to specify operation on the higher class channel (RM-7491). The second petition, filed on behalf of Panther Creek Communications ("Panther"), requests the allotment of Channel 223A at Virginia, Illinois, as that community's first local FM broadcast service. Because the proposals are mutually exclusive, the *NPRM* sought comment on each of the proposals. USA filed supporting comments restating its intention to apply for the upgraded channel if allotted and a counterproposal. Panther filed supporting comments restating its intention to apply for the channel at Virginia if allotted and an opposition to USA's counterproposal. Howard G. Bill ("Bill") filed comments on the counterproposal. After the close of the comment period, USA and Panther filed additional comments.[2] USA also filed a Motion for Expedited Processing, Panther filed comments to the Motion and USA filed reply comments.[3]

2. USA offers two alternative channel proposals for the allotment at Virginia, which would permit both proposals to be granted.[4] USA's first alternative ("Alternative I") proposes the allotment of Channel 224B1 to Taylorville, and the allotment of Channel 267A to Virginia. This also requires the substitution of Channel 253A for the vacant but applied for Channel 266A at Augusta, Illinois.[5] The second alternative ("Alternative II") proposes the allotment of Channel 224B1 to Taylorville and the allotment of Channel 230A to Virginia.

3. Panther's initial comments support the allotment of Channel 223A to Virginia, Illinois, as that community's first local FM transmission service. Panther argues that pursuant to the FM allotment priorities,[6] its proposal is superior to USA's in that it offers first local transmission service under priority 3, while USA's proposal only offers improved existing service which falls under priority 4.

4. Panther objects to USA's alternate channel proposals. It contends that USA's Alternative I, proposing to allot Channel 267A at Virginia, is not technically or financially feasible. Panther contends that the transmitter site proposed for the allotment of Channel 267A to Virginia would require a transmitter site in the Illinois River Valley which would in turn necessitate the use of a tower at least 198 meters (650 feet) above ground level to provide a 3.16 mV/m contour. A tower of such height, Panther contends, would place a heavy financial burden on any applicant, and therefore would make the allotment much less desirable. Panther further argues that a hypothetical site restriction would not provide the requisite city grade coverage to Virginia regardless of the height of the tower.

5. Panther objects to Alternative II because it conflicts with MM Docket No. 90-523, which proposes a change of channels for Station WESZ, Lincoln, Illinois, from Channel 261A to Channel 230A, or alternatively, a counterproposal in that docket to allot Channel 230B1 to Maroa, Illinois, as that community's first local service.[7] Panther states that there is no other Class B1 station available at Maroa. Panther argues that the denial of both USA's request for upgrade and their suggested alternatives would permit the establishment of two new services and the improvement of an existing service in this proceeding and MM Docket No. 90-523.

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[1] The community of Augusta, Illinois has been added to the caption.

[2] Commission Rule 1.415(d) precludes the filing of untimely comments unless specifically requested or authorized by the Commission. Therefore, we will not consider these pleadings in connection with this proceeding.

[3] We note that USA's Motion for Expedited Processing raises allegations of abuse of process by Panther, suggesting that Panther's proposal "may be a pretense to obstruct WTJY from enlarging its coverage area in such a way as to compete with a station in the Springfield, Illinois market." In reply comments, Panther denies the allegations. While these allegations could be relevant to the disposition of this proceeding, as Panther is the original proponent of the Virginia allotment, the submission of an additional expression of interest permits the allotment of a channel at Virginia without reference to Panther's expression of interest. Therefore, we need not resolve the allegations of abuse in this docket. The action taken herein is without prejudice to future action the Commission or its staff may take regarding these allegations.

[4] Public Notice of USA's counterproposal was given on March 27, 1991, Report No. 1842, RM-7682.

[5] A construction permit has been issued for 266A at Augusta, Illinois (BPH-87-0908NC) and conditioned upon the outcome of this proceeding.

[6] The allotment priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters, with priorities (2) and (3) considered as being co-equal. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

[7] *See Notice of Proposed Rule Making* (MM Docket No. 90-523), 5 FCC Rcd 6577 (1990).

6. Bill, permittee of Channel 226A, Decatur, Illinois submitted reply comments requesting the consolidation of MM Docket Nos. 90-510 and 90-523, based on the mutual exclusivity of Alternative II and the Lincoln and Maroa proposals.[8]

7. USA filed comments in support of its proposed upgrade for Channel 224A as well as its counterproposal. USA argues that Panther is wrong in its assumption regarding the tower height which may be required for the Virginia allotment proposed as Alternative I. Contrary to Panther's argument, USA states that at the allotment stage, a proponent need only show that a site exists which meets the Commission's Rules for the allotment, and that such a site is only theoretical until an applicant proposes to construct a tower. USA also disagrees with Panther's argument that an antenna at least 198 meters above ground level would be a heavy financial burden for a new Class A permittee. USA offers a declaration of interest by Mr. Wayne Childers, who states that he will apply for the Virginia allotment, even if it requires a tower in excess of 198 meters.[9] Hence, USA argues that Virginia could receive its first local service even if Panther chooses not to proceed because of the perceived cost associated with an antenna at the proposed site.

8. USA also contends that its Alternative II is still a viable option, but notes that since it conflicts with a number of proposals in another proceeding, Alternative I should be preferred. USA restates its interest in applying for Channel 224B1 if the proposed upgrade is made.

DISCUSSION

9. For the reasons set forth more fully below, we believe the public interest would be served by substituting Channel 224B1 for Channel 224A at Taylorville, Illinois because it would provide that community with a wide coverage FM service and allow Station WTJY(FM) to expand its service area. We believe the public interest would also be served by the allotment of Channel 267A to Virginia as that community's first local transmission service.

10. By proposing a viable alternative which permits both the upgrade and the new allotment to be made, USA has preempted the necessity of comparing the two petitions under *FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). By granting both requests, we are able to improve the existing service to Taylorville, as well as offer first local service to the community of Virginia.

11. A Commission engineering analysis indicates that Channel 224B1 can be allotted to Taylorville with a site restriction of 13.6 kilometers (8.4 miles) to avoid a short spacing to the construction permit for Channel 226A, Decatur, Illinois.[10] Channel 267A can be allotted to Virginia with a site restriction of 13.5 kilometers (8.4 miles) northwest to avoid a short spacing to Station WVEM, Channel 270B, Springfield, Illinois.[11] A Commission engineering analysis indicates that a tower of 170 meters (558 feet) above ground level, with an effective radiated power of 2.2 kW, will provide the requisite city grade coverage to Virginia. Based on Childer's expression of interest, we need not consider Panther's objection to the tower height or Panther's expression of interest being conditioned upon a lower tower. To accommodate this allotment at Virginia, we will order a change of channels from Channel 266A to Channel 253A for the construction permit of Station WAHI, Augusta, Illinois.[12] All of these changes can be accomplished in compliance with the minimum distance separation requirements of the Commission's Rules. We will modify the authorizations of Station WTJY(FM), Taylorville, and Station WAHI, Augusta, to specify operation on the new channels. Panther's objection to Alternative II, and Bill's request for consolidation are moot, as we are not adopting that alternative herein.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 8, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Virginia, Illinois	267A
Taylorville, Illinois	224B1
Augusta, Illinois	253A

13. The window period for filing applications for Channel 267A at Virginia, Illinois will open on **May 11, 1992** and close on **June 10, 1992.**

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WTJY(FM), Taylorville, Illinois, IS MODIFIED to specify operation on Channel 224B1 in lieu of Channel 224A, subject to the following conditions:

> (a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

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[8] Bill asserts that these proposals could also have an impact on two other proceedings: MM Docket No. 89-331, proposing the allotment of Channel 260A at Bartonville, Illinois, and MM Docket No. 89-397, proposing the allotment of Channel 251A at Princeton, Illinois. However, both of these proceedings have been closed. *See Report and Order*, (MM Docket No. 89-331), *Bartonville, Illinois*, 6 FCC Rcd 5157 (1991), *Report and Order*, (MM Docket No. 89-397), *Princeton, Illinois*, 6 FCC Rcd 5142 (1991).

[9] Although filed after the initial comment date to the *NPRM*, Mr. Childer's expression of interest is acceptable because there is no opposition to the allotment at Virginia and no resulting prejudice to the parties by its acceptance. *See, e.g., South Lake Tahoe, California: Reno and Minden, Nevada* (MM Docket No. 89-288), 7 FCC Rcd _____ (released February 11, 1992); *Moscow, Ohio*, 5 FCC Rcd 927 (1990).

[10] The coordinates for Channel 244B1 at Taylorville are North Latitude 39-32-00 and West Longitude 89-27-00.

[11] The coordinates for Channel 267A at Virginia are North Latitude 40-00-47 and West Longitude 90-20-42.

[12] Channel 253A can be operated from the same coordinates which were previously assigned for Channel 266A, at North Latitude 40-16-03 and West Longitude 90-57-10. We need not issue an *Order to Show Cause* or require reimbursement for the change in channels, as the construction permit had not been granted when the counterproposal was filed.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WAHI(FM), Augusta, Illinois, IS MODIFIED to specify operation on Channel 253A in lieu of Channel 266A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in BPH-870908NC except for the channel specified above. Any other changes, except for those specified under Section 73.1690 of the Rules, requires prior authorization for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules. PROVIDED that the transmission facilities comply in all respects with construction permit BPH-870908NC except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of the commencement of program tests.

16. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* to Good News Broadcasters, Inc., Route 1, Box 72, Plymouth, Illinois 62367 (permittee of Station WAHI(FM), Channel 266A, Augusta, Illinois).

17. IT IS FURTHER ORDERED, That the request for consolidation proposed by Howard G. Bill IS DENIED.

18. IT IS FURTHER ORDERED, That the Counterproposal of USA (RM-7682) IS GRANTED.

19. IT IS FURTHER ORDERED, That the Petition (RM-7496) filed on behalf of Panther Communications IS DENIED.

20. IT IS FURTHER ORDERED, That the Motion for Expedited Processing filed by USA Radio Corporation IS GRANTED to the extent that it requests expedition of this proceeding.

21. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

22. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-255

In the Matter of

Amendment of Section 73.202(b), RM-6211
Table of Allotments,
FM Broadcast Stations.
(Lexington, Michigan)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 13, 1992; Released: March 24, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed by Sanilac Broadcasting Company ("Sanilac") of the *Report and Order* in this proceeding, 4 FCC Rcd 2639 (1989). The *Report and Order* allotted Channel 245A to Lexington, Michigan, as that community's first local FM broadcast service, at the request of D.J. Fox ("Fox"). No other comments were filed.[1]

2. *Background.* The *Report and Order* allotted Channel 245A to Lexington based on the expressions of interest in applying for the channel filed by Fox and J. Edward Rassel ("Rassel"). Sanilac filed comments requesting that the allotment proposal be dismissed. It maintained that Fox was either an agent or partner with David C. Schaberg ("Schaberg"), and provided a list of FM proceedings in which Schaberg was involved.[2] Sanilac argued that Fox was not eligible to express an interest in the Lexington allotment because of other broadcast interests in the area. It requested that the Commission conduct an inquiry into other FM proceedings in which Fox and/or Schaberg were involved. The *Report and Order* stated that qualifications of an applicant are more appropriately considered at the application stage, rather than the rule making stage, and referred Sanilac's comments to the Enforcement Division of the Mass Media Bureau for appropriate review and investigation.

3. *Petition for Reconsideration.* Sanilac argues on reconsideration that the *Report and Order* failed to answer the charges made against Fox and failed to show how the grant of the allotment would be in the public interest. Sanilac argues that the petition was "orchestrated" by Schaberg. As evidence, Sanilac notes that only comment filed in support of the Lexington allotment was filed by Rassel, "who stated he is represented by [Schaberg] of the same mailing address as [Fox]." It notes that Schaberg, and not Fox, filed untimely reply comments in the proceeding. Sanilac also claims that it is unable to find anyone named "D.J. Fox." Therefore, Sanilac requests deletion of the Lexington allotment.

4. *Enforcement Division Action.* The Enforcement Division directed a letter of inquiry to Schaberg in March, 1989 to investigate the relationship between Schaberg and Fox. As a result of the investigation, the Enforcement Division concluded that Fox and Schaberg are, in fact, two distinct individuals. As a result, Sanilac's complaint was dismissed and the inquiry closed.[3]

5. *Discussion.* The Enforcement Division has addressed and dismissed Sanilac's allegations. We consider the Enforcement Division's action dispositive of Sanilac's claims raised herein.

6. Furthermore, we note that the Commission has authorized Vector Broadcasting, Inc., as the licensee of Station WBTI, Channel 245A, Lexington, Michigan. Even if Sanilac's allegations were not dismissed, we would consider the filing of an application for Channel 245A at Lexington to constitute an expression of interest in the channel. Deletion of the allotment, therefore, would be contrary to the public interest.

7. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Sanilac Broadcasting Company IS DENIED.

8. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[1] Public Notice of the petition for reconsideration was given on June 2, 1989, Report No. 1782. Sanilac also filed an untimely supplement to its petition for reconsideration. Commission Rule 1.429(d) requires that petitions for reconsideration and supplements thereto must be filed within 30 days from the date of public notice of the action. Public notice of the *Report and Order* was given through Federal Register publication on April 10, 1989, 54 Fed. Reg. 14232, and petitions for reconsideration were due on May 11, 1989. Sanilac filed its supplement on May 18, 1989, and failed to file a separate pleading stating the grounds for acceptance of the supplement, as required by Rule 1.429(d). Therefore, we will not consider this supplement.

[2] Schaberg filed untimely reply comments to the *Notice of Proposed Rule Making* in this proceeding on Fox's behalf. These comments were not accepted.

[3] *See* Letter from Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, to Robert Armstrong, General Manager, Sanilac Broadcasting Company (March 5, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-344

In re Applications of

JULIA A. MOORE File No. BPH-880816MX

WILLIAM L. CARROLL File No. BPH-880816OA

MICHAEL A. McMURRAY & File No. BPH-880816OI
MARILYN A. McMURRAY,
A GENERAL PARTNERSHIP,
d/b/a McMURRAY
COMMUNICATIONS

For a Construction Permit for
a New FM Station on Channel 247A,
Lebanon, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1992; Released: March 23, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE

1. The Review Board has before it for consideration a Joint Motion for Extension of Time in Which to File Exceptions filed on March 5, 1992, by Julia A. Moore and William L. Carroll. The moving parties wish to extend from March 20, 1992 to April 20, 1992, the time for the filing of exceptions to the *Initial Decision of ALJ Chachkin*, FCC 92D-12, released February 19, 1992. The motion was opposed by McMurray Communications, the comparative winner below, on March 10, 1992.

2. Moore and Carroll state that good cause supports their thirty-day extension request based on their desire to "fully assess the effect" of two recent decisions of the U.S. Court of Appeals for the District of Columbia Circuit which address the Commission's integration criteria, *Bechtel v. FCC*, Nos. 91-1112, 91-1116 (January 31, 1992) and *Lamprecht v. FCC*, No. 88-1395 (February 19, 1992), and responsive action by the Commission expected to be taken on March 12, 1992. The moving parties additionally note that the *I.D.* was largely based on the ALJ's application of the integration criteria. McMurray observes in its opposition that Moore and Carroll have failed to show why they cannot assess the court's decisions within the time provided. Moreover, McMurray notes, the expected action to be taken by the Commission on March 12th is the issuance of a *Notice of Proposed Rule Making* which will leave open any questions concerning the continuing viability of the integration criteria for an extended and indefinite period of time.

3. The Board finds that Moore and Carroll have failed to show good cause for the requested 30-day extension of time for the filing of exceptions. The rules provide adequate time for the preparation of exceptions incorporating analysis of the court's recent decisions. Should the Commission's expected March 12th action raise new questions immediately concerning the treatment of the proposals before the Board in the instant proceeding, the Board may call for the filing of supplemental exceptions.

4. ACCORDINGLY, IT IS ORDERED That the Joint Motion for Extension of Time in Which to File Exceptions filed by Julia A. Moore and William A. Carroll IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PORTA-PHONE, INC. File No. 22947-CD-P/ML-01-88
(20090-CD-P/ML-01-89)

For authority to construct and operate a new control facility at Thomasville, Georgia, and for modification of the antenna system at Valdosta, Georgia, and for a new base station location at Moultrie, Georgia, for DPLMRS Station KWT955

MEMORANDUM OPINION AND ORDER

Adopted: March 19, 1992; Released: March 24, 1992

By the Deputy Chief, Common Carrier Bureau:

1. Before the Bureau is a late-filed "Petition to Deny and Order to Show Cause" (petition to deny)[1] filed by LOM, Inc. d/b/a Mobilphone & Beeper, Inc. (LOM) against the captioned application.[2] By its application, Porta-Phone seeks to construct and operate a "satellite transmitter" in Moultrie, Georgia, to construct a new control facility in Thomasville, Georgia and to modify an already constructed transmitter at Valdosta, Georgia.[3] Porta-Phone opposes the petition and LOM filed a reply. Both parties have filed various other pleadings and letters in regard to the captioned application.[4] For the reasons stated herein, we affirm grant of the application and dismiss LOM's petition to deny and petition for reconsideration.

I. BACKGROUND AND CONTENTIONS

2. Porta-Phone has a certificate from the Georgia Public Service Commission (PSC) to operate a paging system in the Thomasville, Georgia service area. It currently operates a two-way paging system and a one-way paging system and has operated on 158.700 MHz at Valdosta and Moultrie, pursuant to Commission authorization but without a license from the state of Georgia. Porta-Phone also operates a wide-area regional paging system on 158.700 MHz in southern Georgia and the panhandle of Florida and operates paging systems on 158.700 MHz near Tallahassee and in about 10 other locations in Florida and Georgia. Porta-Phone states that its system uses the same frequency over a wide area to permit subscribers to be paged as they travel throughout the region. It describes its system as having two terminals, one located in Thomasville, Georgia and the other located in Tallahassee, Florida. Each paging unit is assigned either a Tallahassee or Thomasville local exchange number. When the assigned telephone number is called, the subscriber may be paged regardless of where he or she is located throughout the composite coverage area. Subscribers also have the option of choosing a 1-800 service which would allow them to be paged, at no cost to the caller, anywhere in either Georgia or Florida. Porta-Phone claims that the vast majority of the pagers served on its regional system are Florida-based telephone numbers. According to Porta-Phone, use of its system is "predominantly" interstate, *i.e.*, calls originating in Florida and terminating in Georgia, or vice versa. Porta-Phone has modified its system so that any calls to the Thomasville, Georgia local exchange pager numbers will not pass through the Valdosta or Moultrie, Georgia transmitters. That is, the Valdosta and Moultrie transmitters would transmit pages only from the Tallahassee terminal and only by calling a Tallahassee local exchange number or a Florida 1-800 number.[5]

3. LOM contends that Porta-Phone is operating a paging service in the Valdosta area for which Porta-Phone does not have state certification and that the facilities requested will be used to solicit business in non-certificated areas. It asserts that Porta-Phone has not complied with Section 22.13(f)(1) of the Commission's rules, which requires a licensee to have any requisite state authority within a year of license grant. LOM asserts that Georgia law is clear that prior approval by the Georgia Public Service Commission is required prior to the construction or operation of any paging stations in the state.[6] LOM contends that Porta-Phone's claim that it can operate the facilities as long as it does not solicit customers in non-certificated areas is unsupported.

4. In response, Porta-Phone contends that it need not obtain a state certificate in order to build satellite transmitters outside of its certificated area solely to serve subscribers who roam from its certificated area to the satellite areas.[7] According to Porta-Phone, the Thomasville transmitter does not allow intrastate calls to activate the Valdosta or Moultrie transmitters. It argues that the facilities are used solely for wide-area roaming by subscribers from other certificated areas within the state or out of state areas, and residents of the non-certificated areas are not solicited. Porta-Phone further contends that its possession of a state certificate to operate in an area around Thomasville, Georgia allows it to establish additional facilities outside of its certificated area for the purpose of providing wide-area roaming service to its subscribers, provided that it does not solicit residents of the non-certificated area.[8]

II. DISCUSSION

5. Section 22.13(f)(1) of the rules provides that a licensee must have all requisite state authority and be in operation within a year of the license grant, or the license will automatically expire and must be returned for cancellation. Applications for authority to operate on paging frequencies are not restricted to local paging services. As Porta-Phone correctly points out, there is nothing in the definition of "paging service" or "public land mobile service" that suggests a requirement that paging facilities are exclusively local or intrastate in nature. Porta-Phone's operation of the Valdosta, Moultrie, and proposed Thomasville, Georgia facilities on an interstate basis is not violative of any Commission rule or regulation. Indeed, while the Georgia PSC states that Porta-Phone lacks the authority to provide intrastate service in Georgia outside of its Thomasville certificated area, the Georgia PSC does not, and could not restrict Porta-Phones's use of the captioned facilities to terminate interstate calls. Under these

circumstances, where these facilities comply with federal law, we see no reason not to grant construction and operation of the facilities as requested. The question of whether Porta-Phone's configuration of its facilities is violative of Georgia law is one that would have to be addressed by the Georgia PSC or by the Georgia courts. We conclude that neither Section 22.13(f)(1) nor any other federal law has been violated. Thus, based on the facts of this case, we affirm grant of Porta-Phone's application and dismiss the opposition pleadings filed by LOM.

III. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's rules, THAT the Petition to Deny and Order to Show Cause and the Petition for Reconsideration filed by LOM, Inc., d/b/a/ Mobilphone & Beeper, Inc. ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Originally, LOM's petition was filed against the applications for the assignment of licenses from Porta-Phone, Inc. (Porta-Phone) to Portable Communications, Inc. (Portable) [File No. 28672-CD-AL-01-88; Call Signs KNKC954, KNKD661, KWT955, KWT956, WRV283 and WRW206] as well as against the application for the construction and modification of facilities (File No. 22947-CD-P-ML-01-88) at Valdosta and Moultrie, Georgia. The latter application was placed on public notice March 23, 1988 [PMS-88-26], and was granted October 26, 1988. LOM has also filed a petition for reconsideration of that action. The application for assignment (File No. 28672-CD-AL-01-88) was placed on public notice September 14, 1988 in PMS-88-51. On October 23, 1989, LOM withdrew its petition to deny insofar as it related to the assignment applications. As a result, Porta-Phone assigned these licenses to Charles C. Livingston, Sr. For purposes of this order, we will continue to refer to the applicant as Porta-Phone. However, because the petition to deny was untimely filed with respect to the application that is the subject of this order, we will treat LOM's petition as an informal objection.

[2] The application initially was assigned File No. 22947-CD-P/ML-01-88. When the Commission announced the grant of the application and issued the authorization, it assigned File No. 20090-CD-P/ML-01-89 to the application.

[3] On October 19, 1989, Porta-Phone requested an extension of time within which to construct facilities at Valdosta, Moultrie and Thomasville, Georgia. The request became moot as to the Valdosta and Moultrie facilities because those facilities were constructed in accordance with Porta-Phone's authorization. The request for an extension of time to construct the Thomasville control facility remains pending.

[4] Pending the Commission's ruling, Porta-Phone has temporarily discontinued operation of its facilities at Moultrie and Valdosta, Georgia. Porta-Phone requested and was granted a waiver of Section 22.303 of the Commission's rules to permit the facilities to remain off the air beyond the 120 days specified in the rules.

[5] The state of Florida does not regulate paging systems within that state.

[6] The Official Code of Georgia Annotated Section 46-6-5 states in part:

> No person shall begin or continue the construction or operation of any radio utility system, or of any geographical extension thereof, or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the commission a certificate that the present or future public convenience and necessity require or will require such construction, operation, geographical extension, or acquisition.

[7] Porta-Phone asserts that this interpretation is supported by advice of its Georgia regulatory counsel.

[8] LOM states that Porta-Phone has misled the Commission by responding "no" to questions which ask whether the applicant has been denied state certification for the proposed facilities. By doing so, LOM argues that Porta-Phone has given the impression that it has received requisite state certification. LOM charges that Porta-Phone has engaged in a pattern of knowing, willful, continuing and concealed violation of the Commission's rules and should have its authorizations revoked. Porta-Phone disputes LOM's claim that it misrepresented the status of its facilities or violated Georgia law. Porta-Phone denies that it intentionally attempted to mislead the Commission in filing Forms 401 and Forms 490. It maintains that answers to questions in those applications were accurate except for one instance in which counsel for Porta-Phone inadvertently failed to answer Item 17 of Form 490.

We find no merit to LOM's argument that Porta-Phone intentionally misrepresented its application before the Commission. Porta-Phone's response (in FCC Form 401) that it had not been denied state certification for the facilities proposed in its application is accurate. Similarly, the ommission of a response to that same question in FCC Form 489 does not appear to be an intentional ommission designed to deceive the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-56

In the Matter of

Amendment of Section 73.202(b),	RM-7551
Table of Allotments	
FM Broadcast Stations	
(Bay City and Edna, Texas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 12, 1992; Released: March 25, 1992

Comment Date: May 18, 1992
Reply Comment Date: June 2, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it a petition for rule making filed by Ammerman Enterprises, Inc. ("Ammerman"), permittee of Station KXGJ, Channel 241C2, Bay City, Texas, proposing the substitution of Channel 269C1 for Channel 241C2 at Bay City, and the modification of the Station KXGJ construction permit to specify operation on Channel 269C1.[1] Ammerman states that it will apply for the upgraded channel if allotted. In order to accommodate this upgrade, we are proposing on our own motion the substitution of Channel 241A for vacant but applied for Channel 269A at Edna, Texas.[2]

2. Channel 269C1 can be allotted to Bay City in compliance with the Commission's minimum separation requirements with a site restriction of 25.8 kilometers (16.0 miles) southwest, to avoid short-spacings to Station KLOL, Channel 266C, Houston, Texas, Station KMJQ, Channel 271C, Houston, Texas, and a proposed Channel 268C1 upgrade at Giddings, Texas.

3. We believe that it would be in the public interest to propose the substitution of Channel 269C1 for Channel 241C2 at Bay City, Texas, since it could enable Station KXGJ to expand its service area. Accordingly, we seek comments on the proposed amendment of the Table of FM Allotments, Section 73.202(b) of the Rules, for the community listed below, to read as follows:

Community	Channel Nos.
Bay City, Texas	269C1, 273C2
Edna, Texas	241A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 18, 1992,** and reply comments on or before **June 2, 1992,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis P. Corbett
Leventhal, Senter, and Lerman
Suite 600
2000 K Street, N.W.
Washington, D.C. 20006-1809
(Counsel for Ammerman Enterprises, Inc.)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Table of FM Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in this proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties in the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

[1] The reference coordinates for the Channel 269C1 allotment at Bay City, Texas, are 28-45-58 and 96-04-11. In its petition for rule making, Ammerman had requested a Channel 241C1 upgrade at Bay City. In a related proceeding in MM Docket No. 89-459, we are considering a proposed substitution of Channel 269C2 for Channel 241C2 at Bay City in order to accommodate proposed substitutions at Edna and Giddings, Texas. Instead of modifying the Bay City construction permit to Channel 269C2 and then proposing a co-channel upgrade to Channel 269C1, we are proposing a Channel 269C1 upgrade in this proceeding as a one-step process. This procedure will achieve the public interest benefit of expediting both proceedings. This proposal will not conflict with any proposal or counterproposal in MM Docket No. 89-459. In accordance with Section 1.420(g)(3) of the Commission's Rules, we will not accept any competing expressions of interest for use of the channel at Bay City.

[2] The reference coordinates for the Channel 241A allotment at Edna, Texas, are 28-58-42 and 96-38-48. Robert M. Mason, applicant for the Channel 269A allotment at Edna (File No. BPH-890111IF) will be permitted to amend his application to specify Channel 241A without loss of cut-off protection.

ex parte presentation and shall not be considered in this proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-363

In the Matter of

Amendment of Section 73.606(b), RM-7877
Table of Allotments,
TV Broadcast Stations.
(Springdale, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 16, 1992; Released: March 25, 1992

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 7 FCC Rcd 45 (1992), issued in response to a petition filed on behalf of Total Life Community Educational Foundation ("petitioner") proposing the allotment of UHF Channel 57 to Springdale, Arkansas, as that community's first local television broadcast service. Petitioner filed comments in support of the proposal. No other comments were received.

2. Springdale (population 29,941),[1] is located approximately 225 kilometers (140 miles) northwest of Little Rock.

3. We believe the public interest would be served by allotting Channel 57 to Springdale since it would provide the community with its first local television broadcast service. As stated in the *Notice*, Channel 57 can be allotted to Springdale in conformity with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules without the imposition of a site restriction.[2] Although the Commission has imposed a freeze on new television allotments or applications therefor in certain metropolitan areas, Springdale is not in one of the affected areas.[3]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 11, 1992,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Springdale, Arkansas	57

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Population figures were taken from the 1990 U.S. Census.
[2] Coordinates used for Channel 57 at Springdale are 36-11-00 and 94-08-18.
[3] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-180

In the Matter of

Amendment of Section 73.202(b),	RM-7699
Table of Allotments,	RM-7818
FM Broadcast Stations.	RM-7819
(Seabrook, Huntsville,	
Bryan, Victoria,	
Kenedy and George West,	
Texas)[1]	

ORDER TO SHOW CAUSE

Adopted: March 17, 1992; Released: March 25, 1992

Comment Date: May 18, 1992

By the Acting Chief, Allocations Branch:

1. At the request of KRTS, Inc. ("petitioner"), licensee of Station KRTS(FM), Seabrook, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 3665 (1991), proposing the substitution of Channel 221C1 for Channel 221C2 at Seabrook and the modification of Station KRTS(FM)'s license accordingly. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. Comments and counterproposals were filed by Calvert Broadcasting Company, Helen Maryse Casey ("Casey"), and Bennet Broadcasting, Inc. ("Bennet").[2] Petitioner, Casey and Bennet filed replies. After the pleading cycle ended, Bennet filed a request for withdrawal of its counterproposal and related pleadings.[3]

2. In her counterproposal, Casey, permittee of Station KCEY(FM), Huntsville, Texas, requests the substitition of Channel 258C2 for Channel 259A at Huntsville and the modification of Station KCEY(FM)'s construction permit accordingly.[4] Casey contends that both the Seabrook and the Huntsville proposals can be accommodated by an alternate reference site at Seabrook and the substitution of Channel 221A for Channel 258A at Bryan, Texas. Casey indicates Channel 221A can be allotted to Bryan at the current site of Station KBMA(FM), Channel 258A, Bryan.[5] Casey states that she will apply for Channel 258C2, if allotted to Huntsville, Texas. Casey has expressed her willingness to reimburse Station KBMA(FM) for reasonable and prudent expenses incurred in changing its frequency.

3. We believe the public interest would be served by the consideration of Casey's counterproposal to substitute Channel 258C2 for Channel 259A at Huntsville and to substitute Channel 221A for Channel 258A at Bryan, since it would provide the community with a wide coverage area FM service. In order to proceed with the consideration of Casey's proposal in this proceeding, it is necessary to issue an *Order to Show Cause* to Mexican-American Communications Entertainment Broadcasting Group, licensee of Station KBMA(FM), Channel 258A, Bryan, Texas, seeking comments as to why its license should not be modified to specify operation on Channel 221A in lieu of Channel 258A, as requested by Casey. Although Station KBMA(FM) is provided an opportunity to object to the ordered channel change, this Order does not afford additional opportunity either to comment on the merits of the conflicting proposals or for the acceptance of additional counterproposals.

4. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, that Mexican-American Communications Entertainment Broadcasting Group, licensee of Station KBMA(FM), Bryan, Texas, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 221A in lieu of Channel 258A.

5. Pursuant to Section 1.87 of the Commission's Rules, Mexican-American Communications Entertainment Broadcasting Group, may, not later than **May 18, 1992,** file a written statement showing with particularity why their license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Mexican-American Communications Entertainment Broadcasting Group to furnish additional information. If Mexican-American Communications Entertainment Broadcasting Group raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Mexican-American Communications Entertainment Broadcasting Group will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

6. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order to Show Cause* to the following:

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[1] The communities of Huntsville, Bryan, Victoria, Kenedy and George West, Texas, have been added to the caption.

[2] Public Notice was given to the Casey (RM-7818) and Bennet (RM-7819) counterproposals on October 7, 1991, Report No. 1863.

[3] Bennet's request for dismissal of its counterproposal and related pleadings is in accordance with Section 1.420(j) of the Commission's Rules. We hereby grant the withdrawal request.

[4] Channel 258C2 can be allotted to Huntsville with a site restriction of 24.3 kilometers (15.1 miles) southwest at coordinates North Latitude 30-35-20 and West Longitude 95-45-00.

[5] A Commission engineering analysis reveals that Channel 221A can be substituted for Channel 258A at Bryan at coordinates North Latitude 30-39-02 and West Longitude 96-20-57.

Mexican-American Communications
Entertainment Broadcasting Group
103 North Main Street
Bryan, Texas 77803
(Licensee of KBMA(FM))

Michael E. Beller, Esq.
Verner, Liipfert, Bernhard, McPherson
and Hand, Chartered
901 15th Street, N.W., Suite 700
Washington, D.C. 20005
(Counsel for Helen Maryse Casey)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-297

In the Matter of

Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations. (Snyder, Texas) — RM-7709

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 17, 1992; Released: March 25, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Ramar Communications Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 5791 (1991), proposing the allotment of UHF Channel 17 to Snyder, Texas.[1] Petitioner filed comments stating its intention to apply for UHF Channel 17, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of UHF Channel 17 to Snyder, Texas, since it could provide the community with its first local television service. Channel 17 can be allotted to Snyder with a minus offset[2] consistent with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules without the imposition of a site restriction.[3] Furthermore this action is not affected by the TV freeze imposed in certain metropolitan areas.[4]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 11, 1992,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Snyder, Texas	17-

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner originally proposed the reallotment of vacant UHF Channel 22 from Wolfforth, Texas, to Snyder, Texas. However, the Commission's staff determined the availability of UHF Channel 17 for use at Snyder, thereby eliminating the need for a comparative analysis between the two communities.

[2] As stated in the *Notice*, "a station with a 'plus' or 'minus' offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *See Crandon, Wisconsin*, 3 FCC Rcd 6765 n.1 (1988).

[3] The coordinates for UHF Channel 17 at Snyder are North Latitude 32-43-36 and West Longitude 100-54-42.

[4] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, published July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-129

In the Matter of

Amendment of Section 73.202(b),	RM-7084
Table of Allotments,	RM-7290
FM Broadcast Stations.	RM-7413
(Columbia and Dothan, Alabama, *Graceville, Santa Rosa Beach and Springfield, Florida)*[1]	

FIRST REPORT AND ORDER

Adopted: March 17, 1992; Released: March 25, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 1753 (1990), issued in response to two interrelated petitions for rule making. Emerald Coast Communications, Inc. ("Emerald"), licensee of Station WWAV(FM), Channel 272A, Santa Rosa Beach, Florida, requested the substitution of Channel 271C3 for Channel 272A at Santa Rosa Beach, and the modification of its license to specify the higher class channel. Emerald also requested the substitution of Channel 269A for vacant but applied for Channel 271A at Graceville, Florida,[2] and the substitution of Channel 267A for Channel 270A at Springfield, Florida, and the modification of the construction permit of Station WYOO(FM) at Springfield (RM-7084). Broadcast Associates, Inc. ("BAI"), permittee of Station WESP(FM), Channel 273A, Dothan, Alabama, requested the substitution of Channel 273C3 for Channel 273A at Dothan, and modification of the construction permit for Station WESP(FM) to specify Channel 273C3. BAI also requested the substitution of Channel 269A for Channel 271A at Graceville (RM-7290). In response to the *Notice*, Columbia Broadcasting Group ("CBG") filed comments and a counterproposal, requesting the allotment of Channel 271A to Columbia, Alabama, as the community's first local service (RM-7413).[3] Emerald filed supporting comments restating its intention to apply for Channel 271C3, if allotted. CBG, Emerald and BAI filed reply comments. After the record closed, CBG filed a motion to strike, and EME Communications ("EME") filed comments and an erratum in support of CBG's motion. Only the comments directly relevant to Emerald's proposal will be discussed in this *First Report and Order*.

2. Emerald in its comments reaffirms its intention to apply for Channel 271C3 at Santa Rosa Beach, if allotted. Emerald states its willingness to reimburse the licensee of Station WYOO(FM), Springfield, Florida, for the reasonable cost of changing frequencies. In reply comments Emerald requests that its proposal be severed and acted on expeditiously, since BAI and CBG's proposals are mutually exclusive.

3. We grant Emerald's request for severance, as Emerald's proposal is not mutually exclusive with any other proposal in this proceeding and no party objects to the severance request or to the proposal. We believe the public interest will be served by the substitution of Channel 271C3 for Channel 272A at Santa Rosa Beach, since it would provide the community with a wide coverage area FM service. As stated in the *Notice*, Channel 271C3 can be allotted to Santa Rosa Beach in compliance with the minimum distance separation requirements of the Commission's rules, with a site restriction 11.7 kilometers (7.3 miles) west.[4] In order to accommodate the upgrade at Santa Rosa Beach, we will substitute Channel 269A for Channel 271A at Graceville, Florida, in compliance with the Commission's minimum distance separation requirements at the site specified in the construction permit (BPH-880505MB) for Station WYDA(FM) at Graceville. Channel 267A will be substituted for Channel 270A at Springfield, Florida, in compliance with the Commission's minimum distance separation requirements at the site specified in the construction permit (BPH-870629MT) for Station WYOO(FM) at Springfield.[5] [6]

4. Emerald has stated its willingness to reimburse the licensee of Station WYOO(FM) for all reasonable and necessary expenses incurred with the change in channels. *See Circleville, Ohio*, 8 FCC 2d 159 (1967).[7] Lina M. Parish, permittee of Station WYDA(FM), Graceville, Florida, is not entitled to reimbursement, because she was an applicant when the petition was filed, and applicants are not entitled to reimbursement. *See, e.g., Glenenden, Beach Sweet Home and Toledo, Oregon*, 4 FCC Rcd 7796 (1989).

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[1] Columbia, Alabama, has been added to the caption.

[2] When the *Notice* was issued two applications were pending for Channel 271A at Graceville, Florida. Since that time Lina M. Parish ("Parish") was granted a construction permit for Station WYDA(FM), Channel 271A, Graceville, Florida. The construction permit (BPH-880505MB) is conditioned on the outcome of this proceeding. Both applicants were served with a copy of the *Notice*.

[3] Public Notice of the counterproposal was given on July 2, 1990, Report No. 1820.

[4] The coordinates for Channel 271C3 at Santa Rosa Beach are North Latitude 30-22-31 and West Longitude 86-21-00.

[5] The coordinates for Channel 269A at Graceville are North Latitude 30-57-13 and West Longitude 85-30-06. The coordinates for Channel 267A at Springfield are North Latitude 30-12-30 and West Longitude 85-33-41.

[6] Since these allotments are made pursuant to a petition for rule making filed prior to October 2, 1989, the licensee of Station WWAV(FM) at Santa Rosa Beach may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Channel 268C1, Pensacola, Florida, at coordinates 30-37-29 and 87-05-08. The permittee of Station WYDA(FM), Graceville may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. The permittee of Station WYOO(FM), Springfield may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Channel 267A, Dothan, Alabama, at coordinates 31-12-02 and 85-20-12.

[7] Emerald may, however, share reimbursement costs with any other party directly benefitting from the Graceville substitution in the Second Report and Order.

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 11, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Santa Rosa Beach, Florida	271C3
Graceville, Florida	269A
Springfield, Florida	240A, 267A

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WWAV(FM), Santa Rosa Beach, Florida, IS MODIFIED, to specify operation on Channel 271C3 in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WYOO(FM), Springfield, Florida, IS MODIFIED, to specify operation on Channel 267A in lieu of Channel 270A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in construction permit (BPH-870629MT) except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit (BPH-870629MT) except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WYDA(FM), Graceville, Florida, IS MODIFIED, to specify operation on Channel 269A in lieu of Channel 271A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in construction permit (BPH-880505MB) except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit (BPH-880505MB) except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED with respect to RM-7084.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Randolph Cellular Limited Partnership — File No. 10011-CL-CP-88

For station KNKN267 in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market 336, California RSA 1 - Del Norte

ORDER

Adopted: March 19, 1992; Released: March 25, 1992

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition to Revoke the license of Randolph Cellular Limited Partnership (Randolph) for violations of Sections 22.9, 22.20, and 22.903 of the Commission's rules.[1] On the basis of the facts set forth below, we deny the Petition to Revoke, and implement the Consent Decree attached as Exhibit A.

II. BACKGROUND

2. Randolph filed an FCC Form 489 to notify the Commission that it had completed construction in California RSA 1.[2] Cal-One Cellular Limited Partnership (Cal-One), the block B California RSA 1 licensee, filed a Petition to Revoke Randolph's license. Cal-One argues that Randolph deceived the Commission, that Randolph was not on the air when the Form 489 was filed, and that Randolph's application contained erroneous and misleading engineering findings. Randolph filed an Opposition, and Cal-One filed a Reply. Cal-One claims that the engineering exhibits filed with Randolph's FCC Form 489 were intended to make major modifications which are not allowed on a Form 489. Cal-One claims that this demonstrates Randolph's attempt to mislead the Commission. Cal-One also argues that Randolph intentionally expanded its cellular geographic service area (CGSA) at cell 6 without prior Commission approval. Cal-One also argues that Randolph was not in operation on January 30, 1991, as required by 47 C.F.R. §22.43, because it initially operated on a non-standard control channel.

3. Randolph admits in its Opposition that it filed the wrong exhibits with its Form 489. According to Randolph, the confusion was the result of inadvertence rather than deception. It admits that it operated cell 6 beyond its authorized CGSA, but it explains that it did not anticipate reradiation from the antenna when it was located at a lower point on the tower. Finally, Randolph admits it was not operating on a standard control frequency from January 30 until February 4, 1991. *See* note 7, *infra*. Randolph claims that it did not operate additional cells for which it was not authorized, nor did it make any of the other major modifications which were listed in its engineering exhibits. Randolph argues that it was providing service to the public and that it acted in good faith at all times.

III. DISCUSSION

4. The Commission has authority under Section 312 of the Act to revoke a license in response to misrepresentations made to it by a licensee.[3] This provision applies to applications which are intended to deceive the Commission through the inclusion of information which the licensee knows is erroneous.

> Section 312(a) of the Communications Act states that we "may" revoke a station license for, *inter alia*, "false statements knowingly made" to the Commission, conditions coming to our attention that would warrant denial of an initial application, "willful or repeated failure to operate substantially as set forth in the license," or "willful or repeated violation" of the Communications Act or our Rules. 47 USC §312(a) (emphasis added).

MCI Telecommunications Corporation, 3 FCC Rcd 509, 513 (1988) (*MCI*). A sine qua non of misrepresentation is intent to deceive. *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980). *See also Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172, 1176 (Rev. Bd. 1981) (*Garrett*). In *Garrett*, the Review Board held that "[t]he proponent of a misrepresentation issue has the burden of coming forward with a *prima facie* showing....which must include some evidence of a logical reason, desire, intention or motive to deceive, mislead conceal or misrepresent." *Id.* at 1175-1177. *See* footnote 4, *infra*. Absent an intent to deceive, there can be no misrepresentation and, hence, no revocation. *MCI*, supra. In *Danbury Cellular Telephone Company, Inc.*, 6 FCC Rcd 4186 (Mob. Serv. Div. 1991), the Mobile Services Division held that "in the absence of any evidence of misrepresentation, lack of candor or intention to violate our rules or the Act . . ." it would not revoke the license at issue, despite inconsistent statements submitted by the licensee.[4] *Id.*

5. When Randolph filed its Form 489 on January 29, 1991, the attached engineering exhibits contained information relating to a proposed major modification for which Randolph had not yet applied, but which Randolph states it hoped to bring on line in the spring of 1991.[5] Randolph did not operate in accordance with the engineering information it erroneously filed with its Form 489. Instead, it operated in accordance with its construction permit, except for the unexpected reradiation problem. Despite the allegations raised by Cal-One, we fail to find conduct which supports a finding that Randolph engaged in deception or misrepresentation. Cal-One has not met its burden under *Garrett, supra*.[6]

6. We now turn to Cal-One's argument that Randolph was operating on a non-standard control channel and should therefore forfeit its license. Our rules state that a licensee must be operating within 18 months after it is granted a construction permit. 47 C.F.R. §22.43(c). Our rules do not specify that such operation must be on a standard control channel. In *Delray Cellular Associates*, 4 FCC Rcd 2233 (Mob. Serv. Div. 1989), the licensee op-

erated on a non-standard control channel for five months using voice channels for testing purposes but not serving the public. In *Delray*, the MSD only issued a forfeiture rather than revoking the license. *Id.* In this case, the licensee was on a non-standard control for five days while its customers' phones were being reprogrammed. Randolph's actions were not as egregious as Delray's actions because of the time involved and because of the actions Randolph took to ensure continued service to the public. They do not merit our instigating revocation proceedings.

7. Finally, we address Cal-One's claim that Randolph impermissibly served an area beyond its authorized CGSA in cells 2 and 6 in violation of §22.903(d) of our rules. Cal-One's argument is that Randolph intentionally represented to the Commission that it was operating cells 2 and 6 in compliance with its construction permit, but that Randolph knew it was making major changes without the Commission's permission. We find that Randolph's extension beyond cell 6 was inadvertent. *See* footnote 6, *supra*. Further, based upon Randolph's explanation of its engineering exhibits and Randolph's explanation of the engineering studies used by Cal-One, we find Randolph did not expand its CGSA from cell 2.

IV. CONCLUSION

8. We cannot find that Randolph's conduct demonstrates deceit or misrepresentation. Further, we do not find that Randolph's conduct supports a revocation of Randolph's license. Accordingly, we deny Cal-One's Petition to Revoke Randolph's license.

9. The Commission and Randolph have reached agreement on a Consent Decree which resolves the alleged rule violations raised by the Petition. The terms and conditions of the agreement are contained in the attached Consent Decree.

10. The Common Carrier Bureau, pursuant to delegated authority, finds that the public interest would be served by adopting the Consent Decree, the terms of which are incorporated herein by reference.

V. ORDERING PARAGRAPHS

11. Accordingly, IT IS ORDERED THAT the Petition to Revoke filed by Cal-One Cellular Limited Partnership is DENIED; and

12. IT IS FURTHER ORDERED THAT this Order is effective upon release; and

13. IT IS FURTHER ORDERED THAT the attached Consent Decree is ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 CFR §§22.9, 22.20, and 22.903.

[2] An applicant is required to inform the Commission that it has constructed its cellular system timely in accordance with its authorization. When an applicant files a Form 489 to notify the Commission that it has completed construction, the applicant is said to have "covered" its construction permit.

[3] 47 USC §312 (a). The Commission may revoke a station license or construction permit on several grounds, including:

> (1) false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308, or
>
> (2) for willful or repeated failure to operate substantially as set forth in the license. *Id.*

[4] The Commission retains wide discretion regarding whether to initiate revocation proceedings. *MCI*, 3 FCC Rcd at 513. According to *MCI*, "[T]he Commission can refuse to issue an order to show cause based upon the petition of a third party even if it is determined that violation of Commission rules exists." *Id.* at 514, citing Humboldt Bay Video Co., 56 FCC 2d 68, 71 n.9 (1975). *See also* Danbury Cellular Telephone Company, Inc., 6 FCC Rcd 4186 (Mob. Serv. Div. 1991).

[5] Opposition of Randolph Cellular Limited Partnership to Petition for Revocation of Authorization, filed March 29, 1991, at 3. We recognize that Randolph had one contour extending beyond its designated CGSA (cellular geographic service area) in its market. That was due to the unexpected reradiation which resulted from the lower mounting of its antenna. It is clear that Randolph did not intend to use the Form 489 to deceive the Commission because Randolph reduced power at cell 6 and informed the Commission of the problem as soon as the difficulty was known.

[6] The Mobile Services Division staff reviews each of the cellular applications filed. It is illogical to believe that someone intending to deceive the Commission would attempt to do so by filing misleading information on a form which will be reviewed and where the misrepresentation will be apparent.

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

RANDOLPH CELLULAR CORPORATION — File No. 10011-CL-CP-88

for station KNKN267 in the
Domestic Public Cellular
Radio Telecommunications
Service on Frequency Block A
in Market 336,
California RSA 1 - Del Norte

CONSENT DECREE

1. This Consent Decree (the "Decree") is made as of this _____ day of _____, 1992, between Randolph Cellular Corporation, successor in interest to Randolph Cellular Limited Partnership ("Randolph") and the Federal Communications Commission (the "Commission"), pursuant to Sections 1.80 and 1.93-1.95 of the Commission's rules, 47 CFR §§ 1.80, 1.93, 1.94 and 1.95 (1990).

2. Randolph is licensed by the Commission, to provide non-wireline cellular telecommunications service to the public in the California Rural Service Area No.1, Del Norte, California, Market No. 336 ("California RSA 1").

3. On February 27, 1991, Cal-One Cellular L.P., Randolph's wireline competitor in California RSA 1, filed a Petition for Revocation of Authorization (the "Petition") alleging that Randolph violated certain of the Commission's rules. The Petition is denied in the Order that implements this Decree.

4. The Commission conducted a preliminary investigation based on the allegations of the Petition, responsive pleadings filed by Randolph, and certain subsequent information voluntarily disclosed by Randolph. From this investigation, and prior to review or further comment by Randolph, and making no findings concerning any intentional violations by Randolph or its principals, the Commission believes that a *prima facie* case exists that the following violations of the Commission's regulations apparently occurred:

a. From January 30, 1991 to March 6, 1991, Randolph operated, in one direction, its authorized cell site at Fickle Hill, California at an effective radiated power ("ERP") greater than that authorized by the Commission. On March 6, 1991, Randolph voluntarily decreased the ERP of the cell to below authorized levels.

b. On January 29, 1991, Randolph filed an FCC Form 489 notification that correctly stated that Randolph would commence operations on January 30, 1991, but included an incorrect engineering exhibit prepared to be filed with a future FCC Form 401 application.

c. On September 1, 1991, Randolph completed construction and placed into operation its Antelope Mountain, California cell site, for which the Commission had granted its consent on June 19, 1991. An FCC Form 489 notification was not timely filed. On December 20, 1991, the day Randloph discovered this error, a proper FCC Form 489 notification was filed and the error was disclosed to the Commission.

d. On September 1, 1991, Randolph completed construction and placed into operation its Everitt Hill, California cell site. The Commission granted its consent to the Everitt Hill site on November 19, 1991; the application had been pending since May 23, 1991. On December 20, 1991, the day Randolph discovered this error, a proper FCC Form 489 notification was filed and the error was disclosed to the Commission.

5. For the purposes of this Decree, the following definitions apply:

a. "Randolph" shall mean Randolph, any party with an ownership interest in Randolph, any of Randolph's subsidiaries, affiliates or successors, and any entity that is controlled by Randolph.

b. "Order" shall mean on order of the Commission's Common Carrier Bureau adopting the terms and conditions of this Decree, subject to the parties' compliance with the terms in paragraph 9 of this Decree.

c. "Parties" shall mean (i) Randolph and (ii) the Commission, or any person acting for the Commission under delegated authority.

6. Randolph admits the jurisdiction of the Commission over it for purposes of this Decree and any Order effectuating this Decree. All necessary jurisdictional facts are hereby admitted for purposes of this Decree.

7. Randolph waives any rights it may have to the usual preparation and review of a decision and any rights of judicial review or rights otherwise to challenge or contest the validity of any Order effectuating this Decree. The Parties agree that upon signing by Randolph and the Commission, the provisions of this Decree shall be incorporated by reference in the attached Order formally adopting this Decree.

8. This Decree is for purposes of settlement only, and its signing does not constitute an admission by any party of any violation of law, rules or policy.

9. In consideration for the Commission's entering into this Consent Decree, and in order to avoid any disruption of service to the public, conserve Commission resources, and in order to avoid litigation costs, the parties hereby agree that Randolph shall make a voluntary contribution to the United States Treasury, without further protest or recourse, in the amount of $40,000.00 within ten (10) days of the date on which the Order is released. Randolph agrees that the contribution of $40,000.00 to the United States Treasury may not be claimed as a tax deduction.

10. In light of the covenants and representations contained in this Decree, and in express reliance thereon, the Commission agrees that it will take no further action concerning the matters at issue and the matters raised by the Petition and will issue an Order effectuating this Decree; *provided, however*, that the Parties further agree that this Decree does not constitute any finding or admission that any intentional violations, alleged in the Petition or otherwise, occurred.

11. The Parties agree that any violation of an Order incorporating the terms of this Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to enforcement of a Commission order.

12. If this Decree is not signed by each of the Parties, or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any fashion in a legal proceeding.

13. If the Commission brings an action in any United States District Court to enforce the terms of an Order, the Parties agree that they will not contest the validity of the

Order, will waive any statutory right to a trial *de novo*, and will consent to a judgment incorporating the terms of this Decree.

IN WITNESS WHEREOF the parties hereto have executed this Consent Decree as of the date and year first written above.

FEDERAL COMMUNICATIONS COMMISSION
COMMON CARRIER BUREAU

By: _____
Gerald P. Vaughan, Deputy Chief

RANDOLPH CELLULAR CORPORATION

By: _____
James B. Murray, Jr., President

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-34

In the Matter of

DEBRINE COMMUNICATIONS, INC.

Licensee of Station KBRS(AM),
Springdale, Arkansas

Order to Show Cause Why the
License for Station KBRS(AM),
Springdale, Arkansas, Should
Not be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: February 27, 1992; Released: March 26, 1992

By the Commission:

1. The Commission has before it for consideration (a) the license held by Debrine Communications, Inc. ("Debrine") for Station KBRS(AM), Springdale, Arkansas, and (b) the results of an investigation into KBRS(AM)'s silent status.

2. The Commission's records indicate that KBRS(AM) has been off the air without authority since December 30, 1989. By letter, dated October 26, 1990, and directed to Debrine at its last known official address-of-record, the Chief, Audio Services Division, Mass Media Bureau, requested Debrine to submit information concerning its compliance with § 73.1740 (Minimum Operating Schedule) and § 73.1750 (Discontinuance of Operation) of the Commission's Rules. The letter was returned by the U.S. Postal Service as undeliverable.[1] By letter, dated June 24, 1991, the Chief, Audio Services Division, Mass Media Bureau, again requested the same information from Debrine. That letter, addressed to Debrine at another address derived from the Commission's files, also was returned as undeliverable. Because KBRS(AM) has apparently been off the air without authority for an extended period of time and the licensee has not turned in its license, Debrine is in apparent violation of §§ 73.1740(a)(4)[2] and 73.1750[3] of the Commission's Rules.

3. Accordingly, IT IS ORDERED, That, pursuant to § 312(a)(3) and (4) of the Communications Act of 1934, as amended, Debrine is DIRECTED TO SHOW CAUSE why the license for Station KBRS(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Debrine has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Debrine is qualified to be and remain the licensee of Station KBRS(AM).

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, SHALL SERVE upon Debrine, within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

5. IT IS FURTHER ORDERED, That, pursuant to § 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, Debrine, pursuant to § 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that it will appear at the hearing and present evidence on the matters specified in this Order. If Debrine fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order Debrine files a written statement expressly waiving its right to a hearing, Debrine's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is

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[1] Pursuant to § 1.5 of the Commission's Rules, licensees are required to keep the Commission informed of any changes in their mailing addresses.

[2] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[3] Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuation of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered. See §§ 1.92(c) and (d) of the Commission's Rules.[4]

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for KBRS(AM), Springdale, Arkansas, it shall be determined, pursuant to § 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against Debrine in an amount not exceeding $250,000.00 for the willful and/or repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

9. IT IS FURTHER ORDERED, That, henceforth, the Chief, Mass Media Bureau, shall have the DELEGATED AUTHORITY to issue and release Show Cause Orders in cases involving silent broadcast stations.

10. IT IS FURTHER ORDERED, That the Secretary shall send copies of this Order, by Certified Mail - Return Receipt Requested, to Debrine at the following addresses:[5]

Debrine Communications, Inc.
Licensee of Radio Station KBRS(AM)
2307 71-B North
Springdale, Arkansas 72764

Debrine Communications, Inc.
Licensee of Radio Station KBRS(AM)
25 Connie Lane
Bella Vista, Arkansas 72714-5619

Debrine Communications, Inc.
Licensee of Radio Station KBRS(AM)
386 Cornwall Road
Cleveland, Ohio 44116-1129

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[4] The Commission has delegated authority to the Mass Media Bureau to issue revocation orders in silent station cases. See *Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

[5] These addresses include the last known official address-of-record for Debrine as well as other possible addresses derived from the Commission's records.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-43

In the Matter of

RICHARD L. RAMSEY, TRUSTEE

Licensee of Station KOKY(AM),
Jacksonville, Arkansas

Order to Show Cause Why the
License for Station KOKY(AM),
Jacksonville, Arkansas, Should
Not Be Revoked

ORDER TO SHOW CAUSE AND HEARING DESIGNATION ORDER

Adopted: February 27, 1992; Released: March 26, 1992

By the Commission:

1. The Commission has before it for consideration (a) the license held by Richard L. Ramsey, Trustee ("Ramsey") for Station KOKY(AM), Jacksonville, Arkansas, and (b) the results of an investigation into KOKY(AM)'s silent status.

2. The Commission's records indicate that KOKY(AM) has been off the air without authority since June 25, 1990. By letters, dated October 30, 1990, and August 21, 1991, the Chief, Audio Services Division, Mass Media Bureau, requested Ramsey to submit information concerning his compliance with § 73.1740 (Minimum Operating Schedule) and § 73.1750 (Discontinuance of Operation) of the Commission's Rules. According to a U.S. Postal Service Certified Mail - Return Receipt, Ramsey received the more recent letter on August 26, 1991. However, to date, the Commission has not received a response to the official letters of inquiry. Because KOKY(AM) has apparently been off the air without authority for an extended period of time and the licensee has neither turned in its license nor responded to the official Commission inquiries about KOKY(AM)'s silent status, Ramsey is in apparent violation of §§ 73.1740(a)(4)[1] and 73.1750,[2] of the Commission's Rules.

3. Accordingly, IT IS ORDERED, That, pursuant to § 312(a)(3) and (4) of the Communications Act of 1934, as amended, the licensee is DIRECTED TO SHOW CAUSE why the license for Station KOKY(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Ramsey has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Ramsey is qualified to be and remain the licensee of Station KOKY(AM).

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, SHALL SERVE upon the licensee within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

5. IT IS FURTHER ORDERED, That, pursuant to § 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to § 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that it will appear at the hearing and present evidence on the matters specified in this Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving its right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CER-

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[1] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[2] Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuation of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

TIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered. See §§ 1.92(c) and (d) of the Commission's Rules.[3]

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for KOKY(AM), it shall be determined, pursuant to § 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Order, by Certified Mail - Return Receipt Requested, to Ramsey at the following address:

Richard L. Ramsey, Trustee
5624 Woodgate Drive
Matteson, Illinois 60443

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] The Commission has delegated authority to the Mass Media Bureau to issue revocation orders in silent station cases. See *Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-36

In the Matter of

STARETT MEDIA CORP.

Licensee of Station WFRK(AM),
Coleman, Florida

Order to Show Cause Why the
License for Station WFRK(AM),
Coleman, Florida, Should Not
Be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: February 27, 1992; Released: March 26, 1992

By the Commission:

1. The Commission has before it for consideration (a) the license held by Starett Media Corp. ("Starett") for Station WFRK(AM), Coleman, Florida, and (b) the results of an investigation into WFRK(AM)'s silent status.

2. The Commission's records indicate that WFRK(AM) has been off the air without authority since October 14, 1989. By letters, dated November 9, 1990, and June 24, 1991, the Chief, Audio Services Division, Mass Media Bureau, requested Starett to submit information concerning its compliance with § 73.1740 (Minimum Operating Schedule) and § 73.1750 (Discontinuance of Operation) of the Commission's Rules. However, the letters, both of which were directed to Starett at the only available addresses which could be derived from the Commission's files, were returned by the U.S. Postal Service as undeliverable. Because WFRK(AM) has apparently been off the air without authority for an extended period of time and the licensee has not turned in his license, Starett is in apparent violation of §§ 73.1740(a)(4)[1] and 73.1750,[2] of the Commission's Rules.

3. Accordingly, IT IS ORDERED, That, pursuant to § 312(a)(3) and (4) of the Communications Act of 1934, as amended, the licensee is DIRECTED TO SHOW CAUSE why the license for Station WFRK(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Starett has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Starett is qualified to be and remain the licensee of Station WFRK(AM).

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, SHALL SERVE upon the licensee within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

5. IT IS FURTHER ORDERED, That, pursuant to § 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to § 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that it will appear at the hearing and present evidence on the matters specified in this Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving its right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered. See §§ 1.92(c) and (d) of the Commission's Rules.[3]

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[1] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[2] Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuation of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

[3] The Commission has delegated authority to the Mass Media

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WFRK(AM), it shall be determined, pursuant to § 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Order, by Certified Mail - Return Receipt Requested, to Starett at the following addresses:

Starett Media Corp.
Radio Station WFRK(AM)
1725 Mt. Vernon Road
Leesburg, Florida 32748

Starett Media Corp.
Radio Station WFRK(AM)
193 East Bergen Place
Red Bank, New Jersey 07701

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Bureau to issue revocation orders in silent station cases. See *Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-37

In the Matter of

SANDHILL BROADCASTING COMPANY

Licensee of Station WPSC(AM),
Pageland, South Carolina

Order to Show Cause Why the
License for Station WPSC(AM),
Pageland, South Carolina,
Should Not Be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: February 27, 1992; Released: March 26, 1992

By the Commission:

1. The Commission has before it for consideration (a) the license held by Sandhill Broadcasting Company ("Sandhill") for Station WPSC(AM), Pageland, South Carolina, and (b) the results of an investigation into WPSC(AM)'s silent status.

2. The Commission's records indicate that WPSC(AM) has been off the air without authority since September 13, 1989. By letters, dated November 14, 1990, and June 24, 1991, the Chief, Audio Services Division, Mass Media Bureau, requested Sandhill to submit information concerning its compliance with § 73.1740 (Minimum Operating Schedule) and § 73.1750 (Discontinuance of Operation) of the Commission's Rules. However, the letters, both of which were directed to Sandhill at the only available addresses which could be derived from the Commission's files, were returned by the U.S. Postal Service as undeliverable. Because WPSC(AM) has apparently been off the air without authority for an extended period of time and the licensee has not turned in its license, Sandhill is in apparent violation of §§ 73.1740(a)(4)[1] and 73.1750,[2] of the Commission's Rules.

3. Accordingly, IT IS ORDERED, That, pursuant to § 312(a)(3) and (4) of the Communications Act of 1934, as amended, the licensee is DIRECTED TO SHOW CAUSE why the license for Station WPSC(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Sandhill has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Sandhill is qualified to be and remain the licensee of Station WPSC(AM).

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, SHALL SERVE upon the licensee within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

5. IT IS FURTHER ORDERED, That, pursuant to § 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to § 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that it will appear at the hearing and present evidence on the matters specified in this Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving its right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered. See §§ 1.92(c) and (d) of the Commission's Rules.[3]

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[1] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[2] Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuation of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

[3] The Commission has delegated authority to the Mass Media

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WPSC(AM), it shall be determined, pursuant to § 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Order, by Certified Mail - Return Receipt Requested, to Sandhill at the following addresses:

Michael B. Glinter
Radio Station WPSC(AM)
P.O. Box 305
Pageland, South Carolina 29728

Michael B. Glinter
Radio Station WPSC(AM)
P.O. Box 305, 100 S. Arent Street
Pageland, South Carolina 29728

Sandhill Broadcasting Company
Radio Station WPSC(AM)
P.O. Box 305
Pageland, South Carolina 29728

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Bureau to issue revocation orders in silent station cases. See *Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-39

In the Matter of

DOTHAN BROADCASTING CO., INC.

Licensee of Station WAGF(AM),
Dothan, Alabama

Order to Show Cause Why the
License for Station WAGF(AM),
Dothan, Alabama, Should Not
Be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: February 27, 1992; Released: March 26, 1992

By the Commission:

1. The Commission has before it for consideration (a) the license held by Dothan Broadcasting Co., Inc. ("Dothan") for Station WAGF(AM), Dothan, Alabama, and (b) the results of an investigation into WAGF(AM)'s silent status.

2. The Commission's records indicate that WAGF(AM) has been off the air without authority since May 22, 1991. By letter, dated June 24, 1991, the Chief, Audio Services Division, Mass Media Bureau, requested Dothan to submit information concerning its compliance with § 73.1740 (Minimum Operating Schedule) and § 73.1750 (Discontinuance of Operation) of the Commission's Rules. Dothan received the letter on June 29, 1991. However, to date, the Commission has not received a response to the official letter of inquiry. Because WAGF(AM) has apparently been off the air without authority for an extended period of time and the licensee has neither turned in its license nor responded to the official Commission inquiry about WAGF(AM)'s silent status, Dothan is in apparent violation of §§ 73.1740(a)(4)[1] and 73.1750,[2] of the Commission's Rules.

3. Accordingly, IT IS ORDERED, That, pursuant to § 312(a)(3) and (4) of the Communications Act of 1934, as amended, the licensee is DIRECTED TO SHOW CAUSE why the license for Station WAGF(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Dothan has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Dothan is qualified to be and remain the licensee of Station WAGF(AM).

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, SHALL SERVE upon the licensee within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

5. IT IS FURTHER ORDERED, That, pursuant to § 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to § 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that it will appear at the hearing and present evidence on the matters specified in this Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving its right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered. See §§ 1.92(c) and (d) of the Commission's Rules.[3]

---

[1] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[2] Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuation of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

[3] The Commission has delegated authority to the Mass Media

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WAGF(AM), it shall be determined, pursuant to § 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Order, by Certified Mail - Return Receipt Requested, to Dothan at the following address:

Dothan Broadcasting Co., Inc.
Radio Station WAGF(AM)
P.O. Box 280
Cullman, Alabama 35056

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Bureau to issue revocation orders in silent station cases. See *Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-40

In the Matter of

ANDREW L. BANAS

Licensee of Station WAPR(AM),
Avon Park, Florida

Order to Show Cause Why the
License for Station WAPR(AM),
Avon Park, Florida, Should Not
Be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: February 27, 1992; Released: March 26, 1992

By the Commission:

1. The Commission has before it for consideration (a) the license held by Andrew L. Banas ("Banas") for Station WAPR(AM), Avon Park, Florida, and (b) the results of an investigation into WAPR(AM)'s silent status.

2. The Commission's records indicate that WAPR(AM) has been off the air without authority since March 8, 1990. By letters, dated November 6, 1990, and August 21, 1991, the Commission staff requested Banas to submit information concerning its compliance with § 73.1740 (Minimum Operating Schedule) and § 73.1750 (Discontinuance of Operation) of the Commission's Rules. However, to date, the Commission has not received a response to the official letters of inquiry. Because WAPR(AM) has apparently been off the air without authority for an extended period of time and the licensee has neither turned in its license nor responded to the official Commission inquiries about WAPR(AM)'s silent status, Banas is in apparent violation of §§ 73.1740(a)(4)[1] and 73.1750,[2] of the Commission's Rules.

3. Accordingly, IT IS ORDERED, That, pursuant to § 312(a)(3) and (4) of the Communications Act of 1934, as amended, the licensee is DIRECTED TO SHOW CAUSE why the license for Station WAPR(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Banas has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Banas is qualified to be and remain the licensee of Station WAPR(AM).

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, SHALL SERVE upon the licensee within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

5. IT IS FURTHER ORDERED, That, pursuant to § 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to § 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that it will appear at the hearing and present evidence on the matters specified in this Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving its right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered. See §§ 1.92(c) and (d) of the Commission's Rules.[3]

---

[1] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[2] Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuation of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

[3] The Commission has delegated authority to the Mass Media

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WAPR(AM), it shall be determined, pursuant to § 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Order, by Certified Mail - Return Receipt Requested, to Banas at the following addresses, which include the last known address-of-record for the licensee:

Andrew L. Banas
Radio Station WAPR(AM)
12408 Olive Trail
Plymouth, Indiana 46563

Andrew L. Banas
Radio Station WAPR(AM)
U.S. Highway 27 South
Suite 5801
Avon Park, Florida 33825

Andrew L. Banas
Radio Station WAPR(AM)
Rural Route 2
Plymouth, Indiana

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Bureau to issue revocation orders in silent station cases. See *Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-42

In the Matter of

JACK A. THOMPSON, JR.

Licensee of Station WORI(AM),
Oak Ridge, Tennessee

Order to Show Cause Why the
License for Station WORI(AM),
Oak Ridge, Tennessee Should Not
Be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: February 27, 1992; Released: March 26, 1992

By the Commission:

1. The Commission has before it for consideration (a) the license held by Jack A. Thompson, Jr. ("Thompson") for Station WORI(AM), Oak Ridge, Tennessee, and (b) the results of an investigation into WORI(AM)'s silent status.

2. The Commission's records indicate that WORI(AM) has been off the air without authority since May 11, 1990. By letters, dated November 14, 1990, June 24, 1991, and July 16, 1991, the Chief, Audio Services Division, Mass Media Bureau, requested Thompson to submit information concerning his compliance with § 73.1740 (Minimum Operating Schedule) and § 73.1750 (Discontinuance of Operation) of the Commission's Rules. However, all of the letters were returned by the U.S. Postal Service as undeliverable. Because WORI(AM) has apparently been off the air without authority for an extended period of time and the licensee has not turned in his license, Thompson is in apparent violation of §§ 73.1740(a)(4)[1] and 73.1750,[2] of the Commission's Rules.

3. Accordingly, IT IS ORDERED, That, pursuant to § 312(a)(3) and (4) of the Communications Act of 1934, as amended, the licensee is DIRECTED TO SHOW CAUSE why the license for Station WORI(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Thompson has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Thompson is qualified to be and remain the licensee of Station WORI(AM).

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, SHALL SERVE upon the licensee within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

5. IT IS FURTHER ORDERED, That, pursuant to § 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to § 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that it will appear at the hearing and present evidence on the matters specified in this Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving its right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered. See §§ 1.92(c) and (d) of the Commission's Rules.[3]

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[1] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[2] Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuation of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

[3] The Commission has delegated authority to the Mass Media

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WORI(AM), it shall be determined, pursuant to § 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Order, by Certified Mail - Return Receipt Requested, to Thompson at the following addresses:

Jack A. Thompson, Jr.
Radio Station WORI(AM)
114 Tulsa Road
Oak Ridge, Tennessee 37830

Jack A. Thompson, Jr.
Radio Station WORI(AM)
103 Outer Drive
Oak Ridge, Tennessee 37830

Jack A. Thompson, Jr.
Radio Station WORI(AM)
1012 Brookstone Blvd.
Mt. Juliet, Tennessee 37122

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Bureau to issue revocation orders in silent station cases. See *Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-41

In the Matter of

WAYNE C. MURPHY

Licensee of Station WDAT(AM),
Amory, Mississippi

Order to Show Cause Why the
License for Station WDAT(AM),
Amory, Mississippi, Should Not
Be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: February 27, 1992; Released: March 26, 1992

By the Commission:

1. The Commission has before it for consideration (a) the license held by Wayne C. Murphy ("Murphy") for Station WDAT(AM), Amory, Mississippi, and (b) the results of an investigation into WDAT(AM)'s silent status.

2. The Commission's records indicate that WDAT(AM) has been off the air without authority since June 15, 1989. By letters, dated November 8, 1990, and August 20, 1991, the Chief, Audio Services Division, Mass Media Bureau, requested Murphy to submit information concerning his compliance with § 73.1740 (Minimum Operating Schedule) and § 73.1750 (Discontinuance of Operation) of the Commission's Rules. However, the letters, both of which were directed to Murphy at his last known address-of-record, were returned by the U.S. Postal Service as undeliverable. Because WDAT(AM) has apparently been off the air without authority for an extended period of time and the licensee has not turned in his license, Murphy is in apparent violation of §§ 73.1740(a)(4)[1] and 73.1750,[2] of the Commission's Rules.

3. Accordingly, IT IS ORDERED, That, pursuant to § 312(a)(3) and (4) of the Communications Act of 1934, as amended, the licensee is DIRECTED TO SHOW CAUSE why the license for Station WDAT(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Murphy has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Murphy is qualified to be and remain the licensee of Station WDAT(AM).

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, SHALL SERVE upon the licensee within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

5. IT IS FURTHER ORDERED, That, pursuant to § 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to § 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that it will appear at the hearing and present evidence on the matters specified in this Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving its right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered. See §§ 1.92(c) and (d) of the Commission's Rules.[3]

---

[1] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[2] Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuation of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

[3] The Commission has delegated authority to the Mass Media

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WDAT(AM), it shall be determined, pursuant to § 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Order, by Certified Mail - Return Receipt Requested, to Murphy at the following address, which constitutes the last known address-of-record for the licensee:

Wayne C. Murphy
Radio Station WDAT(AM)
P.O. Box 539
Amory, Mississippi 38821

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Bureau to issue revocation orders in silent station cases. See *Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEBEEP, INC.,
Complainant

v. File No. E-91-113

SAGIR, INC.,
Defendant

ORDER

Adopted March 18, 1992; Released: March 26, 1992

By the Deputy Chief (Operations), Enforcement Division, Common Carrier Bureau:

1. On August 21, 1991, Telebeep, Inc. (hereinafter "Telebeep") filed the above-captioned formal complaint against Sagir, Inc., alleging, among other things, that Defendant's charges to Complainant for resale of cellular mobile radio services were unjust and unreasonable and in violation of the Communications Act of 1934, as amended. On December 26, 1991, however, Telebeep filed a motion to withdraw the complaint without prejudice stating that the parties had resolved all disputes with respect to the matters encompassed in the complaint.

2. We are satisfied that withdrawal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditures of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Telebeep's Motion to Withdraw Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITHOUT PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-35

In the Matter of

BROWN COMMUNICATIONS

Licensee of Station WKIJ(AM),
Parrish, Alabama

Order to Show Cause Why the
License for Station WKIJ(AM),
Parrish, Alabama, Should Not
Be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: February 27, 1992; Released: March 26, 1992

By the Commission:

1. The Commission has before it for consideration (a) the license held by Brown Communications ("Brown") for Station WKIJ(AM), Parrish, Alabama, and (b) the results of an investigation into WKIJ(AM)'s silent status.

2. The Commission's records indicate that WKIJ(AM) has been off the air without authority since January 21, 1991. By letter, dated June 24, 1991, the Chief, Audio Services Division, Mass Media Bureau, requested Brown to submit information concerning its compliance with § 73.1740 (Minimum Operating Schedule) and § 73.1750 (Discontinuance of Operation) of the Commission's Rules. However, to date, the Commission has not received a response to the official letter of inquiry. Because WKIJ(AM) has apparently been off the air without authority for an extended period of time and the licensee has neither turned in its license nor responded to the letter of inquiry, Brown is in apparent violation of §§ 73.1740(a)(4)[1] and 73.1750,[2] of the Commission's Rules.

3. Accordingly, IT IS ORDERED, That, pursuant to § 312(a)(3) and (4) of the Communications Act of 1934, as amended, the licensee is DIRECTED TO SHOW CAUSE why the license for Station WKIJ(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Brown has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Brown is qualified to be and remain the licensee of Station WKIJ(AM).

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, SHALL SERVE upon the licensee within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

5. IT IS FURTHER ORDERED, That, pursuant to § 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to § 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that it will appear at the hearing and present evidence on the matters specified in this Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving its right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered. See §§ 1.92(c) and (d) of the Commission's Rules.[3]

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[1] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[2] Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuation of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

[3] The Commission has delegated authority to the Mass Media

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WKIJ(AM), it shall be determined, pursuant to § 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of §§ 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Order, by Certified Mail - Return Receipt Requested, to Brown at the following address, which constitutes the last known address-of-record for the licensee:

Brown Communications
Radio Station WKIJ(AM)
314 Highway 78 By-Pass
Jasper, Alabama 35501

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Bureau to issue revocation orders in silent station cases. See *Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS
COMMUNICATIONS, INC.,
Complainant,

v. File No. E-90-437

CAROLINA TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: March 19, 1992; Released: March 27, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 5, 1990, Cable & Wireless Communications, Inc. (hereinafter "CWC") filed the above-captioned formal complaint against Carolina Telephone and Telegraph Company (hereinafter "Carolina Telephone") seeking recovery of damages for Carolina Telephone's alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1988. On March 13, 1992, however, CWC and Carolina Telephone filed a joint motion to dismiss the complaint with prejudice stating that the parties had disposed of all issues and controversies in the complaint.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that CWC's and Carolina Telephone's Joint Motion to Dismiss IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION
Complainant,

v. File No. E-89-78

CINCINNATI BELL
TELEPHONE COMPANY
Defendant.

ORDER

Adopted: March 18, 1992; Released: March 27, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 27, 1989, Western Union Corporation (now New Valley Corporation) ("New Valley") filed a series of substantially similar complaints against several carriers, including Cincinnati Bell Telephone Company ("Cincinnati Bell"). It alleged that the carriers' rates for special access for the years 1987 and 1988 were unjust and unreasonable due to improper allocation of certain costs. However, after reviewing the series of complaints, New Valley concluded that because of the special circumstances involving the nature of the circuits furnished by Cincinnati Bell, a resolution of the allocation issues in New Valley's favor would be unlikely to result in material refunds by Cincinnati Bell. Therefore, on January 17, 1992, New Valley filed a "Motion to Dismiss Proceeding," stating that no useful purpose would be served by continuing to litigate the issues as to Cincinnati Bell.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under 47 C.F.R. § 0.291, that New Valley's request for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc.

Petition for Waiver of Part 69
of the Commission's Rules to
Establish an Information
Surcharge Element

ORDER

Adopted: March 19, 1992; Released: March 27, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On September 30, 1991, US West Communications, Inc. (US West) requested a waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to the extent necessary to permit the establishment of an Information Surcharge rate element within the Information category. Specifically, US West seeks a waiver of Section 69.405 of the Commission's Rules, 47 C.F.R. § 69.405, and any other portions of Part 69 necessary to establish a separate Information Surcharge rate element.[1] The US West waiver request is unopposed.

2. US West states that its costs associated with providing directory assistance and publishing white pages are presently combined in a single Information rate element recoverable on a per call basis through a directory assistance service charge. US West Petition at 2. US West contends that it is inappropriate, under this current cost scheme, for directory assistance users to bear the cost burden of publishing and distributing white pages, which is a service that benefits all end users. Moreover, says US West, white pages costs can be more efficiently recovered through a separate rate element assessed to all interstate access switched minutes of use (MOUs). *Id.* at 1-2. Therefore, it asserts, separation of the existing Information rate element into an interstate directory assistance charge and an Information Surcharge supports the Commission's policy of recovering costs from cost causers. *Id.* US West then explains that the new information surcharge would be billed to IXCs which would most likely pass the charge on to their customers, the actual beneficiaries of white pages publication. *Id.*

3. The Bureau has previously granted waivers similar to the one US West requests. In 1985, we granted certain carriers permission to remove from the Information category those costs which they believed -- and could establish -- were not incurred in the provision of Interexchange Directory Assistance (IDA) service.[2] These removed costs included at least some portion of white pages publication costs. The Bureau stated that the carriers could recover those costs only through a separate Information Surcharge rate element, priced per access minute of use, with separate premium and non-premium rates. *1985 Waiver Order* at para. 76. The Bureau later extended this waiver indefinitely so that the petitioning local exchange carriers could continue to recover non-interstate directory assistance information costs through an Information Surcharge.[3] Finally, the Bureau recently granted Southwestern Bell Telephone Company a waiver of Part 69 to create a separate Information Surcharge rate element.[4] As US West's waiver request is similar to those previously granted by the Bureau, we grant its request as well. We grant US West's waiver, however, only to the extent that it conforms to the *1985 Waiver Order*.

4. ACCORDINGLY, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, filed by US West Communications, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

[1] Section 69.405 requires that the interstate portion of white pages directory expenses be recovered on a per call basis through the Information rate element. Other rule sections that must be waived to accommodate US West's request are Sections 69.4(b) and 69.109, 47 C.F.R. §§ 69.4(b), 69.109. Section 69.4(b) describes the access service rate elements local exchange carriers must charge. Section 69.109(a) requires that costs associated with the Information element be met through charges assessed on interexchange carriers (IXCs) that are "connected to assistance boards through interexchange directory assistance."

[2] *See* Petitions for Waiver Concerning 1985 Annual Access Tariff Filings, Mimeo No. 5007, released June 7, 1985, at paras. 76-77 (*1985 Waiver Order*).

[3] *See* Annual 1989 Access Tariff Filings, Petitions for Waiver and Petition for Reconsideration, 4 FCC Rcd 413, 414 (1988).

[4] *See* Southwestern Bell Telephone Company Petition for Waiver of Part 69 of the Commission's Rules for Information Surcharge Element, 6 FCC Rcd 6101 (Com.Car.Bur. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-378

In the Matter of

United Tele-Systems
of Virginia, Inc.

ORDER
(Proceeding Terminated)

Adopted: March 20, 1992; Released: March 27, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On December 23, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 20, 1991, United Tele-Systems of Virginia, Inc. (UTV) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, UTV states that its total charge for a sample eight-minute call would be $6.42 under its revised rates. In a report filed September 23, 1991, UTV stated that its total charge for the same call under the rates then in effect would be $8.22. This represents a reduction of almost 22 percent from the highest total charge UTV reported in its September 23 report. It was on the basis of that report and the rates UTV then had in effect that we found that UTV's rates appeared to be unjust and unreasonable. UTV no longer charges the rates that prompted this proceeding. UTV therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-378 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[1] *See, e.g.*, United Tele-Systems of Virginia, Inc., CC Docket No. 91-378, DA 91-1613, released Dec. 23, 1991 (Com.Car.Bur.).

[2] We emphasize that this Order does not represent an affirmative finding that UTV's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Contract Tariff F.C.C. No. 1	Contract Tariff Transmittal Nos. 1, 3, and 6
AT&T Communications Contract Tariff F.C.C. No. 2	Contract Tariff Transmittal No. 2

ERRATUM

Released: March 27, 1992

On February 25 and 27, 1992, the Common Carrier Bureau released Orders in the captioned proceedings.[1] Paragraphs 2 and 4 of the *CT 2 Order* should be revised to read as follows:

2. On February 19, 1992, the Competitive Telecommunications Association (Comptel) and MCI Telecommunications Corporation filed petitions to reject or, in the alternative, to suspend and investigate Contract Tariff Transmittal No. 2.

* * *

4. Accordingly, IT IS ORDERED that the petitions to reject or, in the alternative, to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 2, Transmittal No. 2, filed by the Competitive Telecommunications Association and MCI Telecommunications Corporation ARE DENIED.

Paragraphs 2 and 4 of the *CT 1 Order* should be revised to read as follows:

2. On February 19, 1992, the Competitive Telecommunications Association (Comptel) and MCI Telecommunications Corporation filed petitions to reject or, in the alternative, to suspend and investigate Contract Tariff Transmittal No. 1 and US Sprint Communications Company Limited Partnership filed a petition to reject or alternatively suspend and investigate Contract Tariff Transmittal No. 1.

* * *

4. Accordingly, IT IS ORDERED that the petitions to reject or, in the alternative, to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 1, Transmittal No. 1, filed by the Competitive Telecommunications Association and MCI Telecommunications Corporation and the petition to reject or alternatively suspend and investigate Contract Tariff F.C.C. No. 1, Transmittal No. 1, filed by US Sprint Communications Company Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[1] AT&T Communications, Contract Tariff Tr. No. 2, DA 92-225, released Feb. 25, 1992 (Com.Car.Bur.) (*CT 2 Order*); AT&T Communications, Contract Tariff Tr. Nos. 1, 3 and 6, DA 92-246, released Feb. 27, 1992 (Com.Car.Bur.) (*CT 1 Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

TEN-TEN GENERAL PARTNERSHIP File No. 10616-CL-P-361-A-89

For facilities in the Domestic Public Cellular Radio Telecommunications System on Frequency Block A in Market No. 361, Florida 2 - Glades.

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 1992; Released: March 16, 1992

By the Chief, Mobile Services Division:

I. BACKGROUND

1. On January 29, 1992, the Commission issued a Public Notice, Mimeo No. 21449, announcing that the Commission would conduct lotteries on April 8, 1992, to select winning cellular radio applications in 29 Rural Service Areas (RSAs). In each of these markets, lotteries have been held previously, but the winning applications have been found defective under the Commission's rules and dismissed. One of the dismissed applicants was Ten-Ten General Partnership (Ten-Ten), whose application is captioned above. Ten-Ten filed a petition for reconsideration of the Mobile Services Division (MSD) dismissal which was denied in a Memorandum Opinion and Order, *Butte Cellular Group*, 6 FCC Rcd 6745 (1991). Ten-Ten filed a petition for reconsideration of that order. It now seeks to stay the non-wireline lottery for Market 361, pending final review of its petition for reconsideration.[1]

2. Ten-Ten argues that the Commission has not acted on its most recent petition for reconsideration nor its supplement to that petition which allege that the Commission has not complied with the requirements of the Paperwork Reduction Act (PRA). According to Ten-Ten, the Office of Management and Budget (OMB), in a February 6, 1992 letter to the Commission, has determined that (1) the firm financial commitment requirement applied to Ten-Ten's application includes "substantive modifications" to the financial showing requirement originally proposed by the Commission and approved by OMB; and (2) the financial showing requirement applied to Ten-Ten's application was not approved by the OMB at the time it was implemented. Based on the OMB regulations implementing the PRA, Ten-Ten maintains that the Commission's dismissal of its application was an unlawful penalty imposed upon Ten-Ten which warrants reinstatement of its application. Moreover, Ten-Ten argues that for the Commission to conduct another lottery for the Florida 2 RSA without resolving the outstanding issues will result in an inefficient use of agency resources. It will be unfair to both Ten-Ten and the applicant selected in the re-lottery, in that the Commission will vest the new applicant with a direct interest in appealing a possible subsequent grant of Ten-Ten's application.

II. DISCUSSION

3. Ten-Ten has failed to make a sufficient showing to justify the extraordinary relief it seeks. It has not shown that it will suffer irreparable injury if the lottery takes place as scheduled. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). The lottery procedure neither constitutes, nor automatically results in, the grant of a construction permit. Rather, it initiates a process which will require some time before the issuance of a construction permit. Even after that process is completed, should the petitioner wish to challenge the grant of the construction authorization to the lottery winner, it may file a petition for reconsideration or an application for review of the grant. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1977). The courts have recognized that license grants which are challenged by litigation may be undone if the court reversed the grant. *See, e.g., Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976). Moreover, in the public notice announcing the new lottery, the MSD explained that any authorization in this market will be conditioned upon the Commission's action dismissing the application for the previous winner becoming final and no longer subject the judicial review. Accordingly, we conclude that Ten-Ten has failed to demonstrate that it will suffer irreparable harm, as is required for grant of a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). We further note that granting a stay would harm the public in general and other interested parties because a delay of the lottery would deny expeditious service to the public if Ten-Ten's appeals turn out to be unsuccessful.

4. Accordingly, IT IS ORDERED that the emergency petition to defer action filed by Ten-Ten General Partnership (File No. 10616-CL-P-361-A-89) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] Ten-Ten filed a supplement to its petition for reconsideration on February 20, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CELLS COMPANY L.P. File No. 10621-CL-P-366-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 366, Florida 7 (Hamilton)

CELLSWITCH L.P. File No. 10513-CL-P-460-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 460, Louisiana 7 (West Feliciana)

CELLULAR REGIONAL LIMITED PARTNERSHIP File No. 10266-CL-P-423-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 423, Iowa 12 (Winneshiek)

CGSA TELEPHONES L.P. File No. 10511-CL-P-458-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 458, Louisiana 5 (Beauregard)

CONTINENTAL ALASKA LIMITED PARTNERSHIP File No. 10003-CL-P-316-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 316, Alaska 2 (Bethel)

CONTINENTAL ELECTRONICS L.P. File No. 10104-CL-P-545-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 545, Nevada 3 (Storey)

DELTA CELLULAR PARTNERS File No. 10613-CL-P-313-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 313, Alabama 7 (Butler)

EASTERN CELLULAR SYSTEMS L.P. File No. 10504-CL-P-440-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 440, Kansas 13 (Edwards)

FEDERAL MOBILE RADIO L.P. File No. 10038-CL-P-319-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 319, Arizona 2 (Coconino)

INDEPENDENT CELLULAR SYSTEMS L.P. File No. 10049-CL-P-699-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 699, Washington 7 (Skamania)

JEFFERSON CELLULAR L.P. File No. 10449-CL-P-509-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 509, Missouri 6 (Marion)

MOVING PHONES PARTNERSHIP L.P. File No. 10265-CL-P-488-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 488, Minnesota 7 (Chippewa)

QUADRANGLE COMMUNICATIONS File No. 10407-CL-P-659-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 659, Texas 8 (Gaines)

SILVER WINGS 1988 L.P. File No. 10083-CL-P-611-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 611, Oregon 6 (Crook)

21st CENTURY TELCOM L.P. File No. 10109-CL-P-675-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 675, Utah 3 (Juab)

21st CENTURY TELCOM L.P. File No. 10311-CL-P-403-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 403, Indiana 1 (Newton)

U.S. RSA TELCO PARTNERS L.P. File No. 10174-CL-P-634-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 634, South Dakota 1 (Harding)

WESTERN CELLTEL L.P. File No. 10230-CL-P-427-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A, in Market 427, Iowa 16 (Lyon)

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 1992; Released: March 16, 1992

By the Chief Mobile Services Division:

I. BACKGROUND

1. On January 29, 1992, the Commission issued a Public Notice announcing that the Commission would conduct lotteries on April 8, 1992 to select winning cellular radio applicants for twenty-nine Rural Service Areas (RSAs).[1] The above-captioned applicants (hereinafter referred to collectively as Movants) were non-wireline lottery winners and were announced as tentative selectees for their respective RSA markets.[2] Each of their applications was dismissed by the Mobile Services Division as unacceptable for filing pursuant to Section 310(b)(1) of the Communications Act of 1934, as amended and Section 22.4 of the Commission's rules. These dismissals were subsequently upheld by the Commission.[3] The Movants have filed Notices of Appeal with the U.S. Court of Appeals for the D.C. Circuit. The markets in which the Movants had originally been selected are among those in the re-lotteries scheduled for April 8, 1992 and listed in the *Lottery Notice*. On February 26, 1992, the Movants filed a Joint Motion for Stay and Request for Expedited Consideration to stay the April 8 lotteries pending the outcome of the judicial appeals.

2. The Movants argue that a stay is justified because they will suffer irreparable harm if the Commission conducts the April 8, 1992, lotteries. The Movants claim that a grant of a new authorization will prejudice their appeal and harm their vested interest in the markets in which they were selected. In this regard, the Movants argue that the Commission has only said that a "grant to a second selectee '*may* be undone' or '*could* be undone'" and never that it "shall or must be undone." Joint Motion at para. 9 (Emphasis in original.) The Movants express a concern that the Commission "may feel compelled to invoke some equitable form of relief [such as] imposing a sharing arrangement, requiring a comparative hearing or conducting a two-party run-off lottery" if the court reverses the Commission and the Commission is faced with two qualified selectees.

3. The Movants further argue that they have a substantial chance of prevailing on the merits on their appeals. Furthermore, the Movants assert that a stay will not harm the other applicants in the markets. Finally, the Movants claim that the public interest would be served by a stay of the April 8, 1992 lotteries.

II. DISCUSSION

4. Movants have failed to make a sufficient showing to justify the extraordinary relief they seek. They have not shown that they will suffer irreparable injury if the lottery takes place as scheduled. The lottery procedure neither constitutes nor automatically results in the grant of a construction permit. Rather, it initiates a process which will require some time before a construction permit is issued. Even after the process is completed, should any of the Movants wish to challenge the grant of a construction authorization to a lottery winner, it may file a petition for reconsideration or an application for review. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The courts have recognized that license grants which are challenged by litigation are subject to that litigation and may be undone if the court reverses the grant. *See, e.g., Alianza Federal de Mercedes v FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976). Moreover, any construction authorization is conditioned on the outcome of any pending proceedings regarding the dismissal of prior lottery winners. There is, therefore, no basis for Movants' assertion that the Commission would be unable to provide it with adequate relief should it ultimately prevail on the merits. Accordingly, we conclude that Movants have failed to demonstrate that they will suffer irreparable harm, as is required for the grant of a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). We further note that granting a stay would harm both the public in

general and the interested parties because a delay of the April 8, 1992 lottery would prevent expeditious service to the public if Movants' judicial appeals are denied.

5. Accordingly, IT IS ORDERED that the request for stay filed by Movants IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See Lottery Notice*, Mimeo No. 21449, (released January 29, 1992). *(Lottery Notice)*

[2] Continental Alaska's application for the Alaska 2 RSA was dismissed prior to Continental Alaska's formal designation as tentative selectee.

[3] *See Continental Cellular*, 6 FCC Rcd 6834 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-35

In the Matter of

Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation 38364

ORDER

Adopted: March 12, 1992; Released: March 13, 1992

By the Commission:

1. On January 6, 1992 and January 31, 1992, the American Public Communications Council ("APCC") filed motions requesting that we partially stay Sections 64.704(c) and (d) of our rules.[1] These provisions require call aggregators to unblock equal access ("10XXX") codes according to a phased schedule and require all operator service providers ("OSPs") to establish 800 or 950 access numbers. The deadline for compliance with certain 10XXX unblocking requirements and the 800/950 access provision is six months after the effective date of the rules, or March 16, 1992.

2. APCC requests that we stay the 10XXX unblocking requirement until we rule on the issues raised in its petition for reconsideration[2] and that we stay the 800/950 requirement with regard to "store-and-forward" ("S&F") OSPs until we decide whether that requirement should be waived for such OSPs. In the *Report and Order*, we agreed "in principle" that payphone owners who are considered OSPs should not have to establish 800 or 950 access, but we invited store-and-forward OSPs to submit waiver requests regarding that requirement so that we could consider the circumstances of all S&F OSPs and not simply payphones.[3]

3. In determining whether to grant a stay request, an important factor to consider is whether a stay would be in the public interest.[4] The issues implicated by the instant stay requests, 10XXX unblocking and the establishment of 800 or 950 access by S&F OSPs, have been raised in pending petitions for reconsideration or waiver. We believe the public interest would best be served by ruling on the petitions before requiring the affected parties to take actions to comply with the requirements at issue. Because we will soon act on those petitions, we shall, in our discretion, stay Section 64.704(c) for all aggregators subject thereto and Section 64.704(d) as to OSPs who provide only a store-and-forward service. The stay shall remain in effect until we rule on the pending reconsideration petitions regarding 10XXX unblocking and the waiver requests regarding the establishment of 800 or 950 access by S&F OSPs.[5]

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the motions for stay filed by the American Public Communications Council on January 6, 1992 and January 31, 1992, and by the parties named in footnote 1 ARE GRANTED to the extent indicated herein.

5. IT IS FURTHER ORDERED, pursuant to Section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Order is EFFECTIVE UPON ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] 47 C.F.R. § 64.704(c), (d). These provisions were adopted in Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35: Report and Order and Further Notice of Proposed Rule Making, 6 FCC Rcd 4736 (1991) (hereinafter *Report and Order*), *petitions for reconsideration pending*. In addition, between February 10 and February 27, 1992, IMR Capital Corp., Dennison Group Ltd., American Paytel, Tri-County, Inc., M & M Telecommunications, Inc., National Telecoin Corp., Coin Op Phone Service of New Jersey, and 4M Communications Inc. filed motions requesting that we stay Section 64.704(c). We will act on these motions herein only to the extent that the requested stay would coincide with the period of time requested by APCC, i.e., pending a decision on the APCC reconsideration petition. We will separately consider any requests for a stay beyond this period.

[2] The American Telephone and Telegraph Co. ("AT&T") and the United States Telephone Association filed oppositions to APCC's motion for partial stay of the 10XXX unblocking requirement.

[3] *Report and Order*, 6 FCC Rcd at 4744. APCC has filed a petition for waiver of this requirement as applied to S&F OSPs. *See* Petition for Waiver, filed by APCC on January 31, 1992. Other parties have filed similar petitions.

[4] *See* Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958) (the public interest is necessarily a "crucial" factor in proceedings involving the administration of regulatory statutes designed to promote the public interest; other factors also relevant).

[5] Regarding AT&T's argument that a stay is not in the public interest because it would thwart the legislative intent of the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226), we note that this stay is temporary because we will soon act on the petitions for reconsideration and, in any event, the provisions that we are staying are not required by the statute.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-541

In re Applications of

JOSEPH BAHR	File No. BPH-871028MB
GUILLERMO A. BONET	File No. BPH-871029MH
RENACER BROADCASTERS CORPORATION	File No. BPH-871029MK
OCCIDENTAL BROADCASTING CORPORATION	File No. BPH-871029MM

For Construction Permit for
New FM Station on Channel 291A,
Hormigueros, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1992; Released: March 31, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Edward Luton, 6 FCC Rcd 4488 (1991), which awarded a construction permit for a new FM station in Hormigueros, Puerto Rico, to Renacer Broadcasters Corporation and denied the competing applications of Joseph Bahr, Guillermo A. Bonet, and Occidental Broadcasting Corporation. Renacer, Bahr and Bonet have filed exceptions and replies.[1]

2. The ALJ heard the case under the standard comparative issue, which is governed primarily by the guidelines set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).[2] Bonet argues that the ALJ also should have granted his motion to reopen the record and should have designated a candor issue against Renacer. *See Memorandum Opinion and Order*, FCC 91M-395 (ALJ, released Feb. 1, 1991). According to Bonet, Larry Ramos, Renacer's President and a director, claimed in a deposition that he would finance the station with a bank loan secured by property he owns and to which he holds title deeds either alone or jointly with his brother.[3] Bonet argues that Larry Ramos does not own any real property in Puerto Rico and hypothesizes from this that someone else, possibly Ramos' father Castolino Ramos, must be involved in collateralizing the loan. Renacer objects to this exception on the procedural ground that Bonet did not adequately support his motion below and also argues that the unchallenged legal opinion of Renacer's local counsel, on which the ALJ relied for his ruling, correctly sets forth its principals' real estate rights under Puerto Rican law. For the reasons set forth below, the Board finds that this proceeding must be remanded for further hearing.

BACKGROUND

3. The issues here arose out of Larry Ramos' deposition. During questioning about how he determined Renacer is financially qualified and what he submitted to the bank for a letter promising funding, Ramos testified:

> A. We analyzed the properties I have. I saw the value of them. And I made an estimated budget, and I understood that, yes, that I could --
>
> Q. That you could do what?
>
> A. That I could carry the project of the radio station.
>
> Q. Now, when you say "I," are you referring to yourself personally?
>
> A. Yes.
>
> * * *
>
> Q. Did you have to submit any financial information to the bank?
>
> A. Yes.
>
> Q. What financial information did you submit?
>
> A. Title deeds.
>
> Q. Pardon me?
>
> A. Title deeds. Property title deeds.
>
> Q. Were they to property that was owned by Radio Renacer?
>
> A. No.
>
> Q. Who owned the property?
>
> A. Myself.

Deposition of Larry Ramos, pages 42-44, Exhibit A to Bonet and Occidental Motion to Re-Open Record and Enlarge Issues, filed September 27, 1990. Ramos was also asked:

[1] Joseph Bahr filed exceptions on August 13, 1991. Renacer and Bonet filed on September 9, 1991, pursuant to an extension of time granted for good cause on August 26, 1991. Replies were filed by Bonet on September 16, 1991, Renacer on September 19, 1991, and Bahr on September 20, 1991. Occidental did not file exceptions to the *Initial Decision*, so Renacer's Motion to Dismiss its application with prejudice will be granted for failure to prosecute.

[2] An air hazard issue designated against Joseph Bahr was resolved in Bahr's favor in *Order*, FCC 90M-2431 (ALJ, Aug. 8, 1990).

[3] According to Larry Santos' hearing testimony, the station will be nonprofit. Tr. 99. Its format could be commercial and definitely will not be religious. Tr. 104, 128, 130.

> Q. With respect to the properties that you demonstrated to the bank as in connection with your loan or request for a loan, does any other person have any interest in them?
>
> [Objection made and withdrawn.]
>
> A. There's one that belongs to my brother.
>
> Q. How many properties in all are involved?
>
> MR. MITCHELL: Objection. We have a question here about the clarification of the translation. I believe that the witness's answer was that it was jointly held with his brother, and the translation was that it was owned by his brother.
>
> Is that correct? Is it jointly held?
>
> A. It's joint.

Deposition of Larry Ramos, pages 67-68, Attachment 1 to Renacer Opposition to Motion to Reopen Record and Enlarge Issues, filed October 19, 1990. In his October 16, 1990, Declaration, Larry Ramos said:

> I, as representative of Renacer, obtained financing for Renacer's application from the Cooperativa de Ahorro y Credito de Lajas. In doing so, I presented the bank with title deeds to certain properties I own in Puerto Rico. I testified at my deposition that my brother, Santos Ramos, and I jointly own one of the properties. I failed to mention that Santos Ramos's wife also has an interest in the same property. The other property is jointly owned by me and my wife, Santa Morales Toro.

Attachment 4 to Renacer Opposition. During both her deposition and at the hearing, Santa Morales, Ramos' wife and a Renacer officer and director, testified that she knew her husband had promised the bank a mortgage on the property where she lives and had agreed to that. Deposition of Santa Morales Toro, pages 36-37, Exhibit B to Bonet and Occidental Motion; Tr. 297.

4. Bonet supported his allegations with certificates from the Commonwealth of Puerto Rico Treasury Department, Bureau of Property Tax, that neither Larry Ramos nor Santa Morales Toro appear to have any property in their names. Renacer responded with a legal opinion from its local counsel given under penalty of perjury that, although neither the questioning attorneys nor the answering witnesses used precise language, the answers reflected "a correct layman's understanding" of their rights and powers. Legal Opinion of Victor R. Sotomayor Clavell, October 18, 1990, page 2, Attachment 3 to Renacer Opposition to Motion to Reopen Record and Enlarge Issues. According to Sotomayor, "Larry Ramos and Santa Morales, acting jointly, have sufficient legal rights and interests in the properties to commit said interests on both parcels of land to the loaning institution without further authorization from any other party." *Id.* at p. 3.[4] In giving this opinion, Sotomayor described the interests of Larry Ramos and Santa Morales in the properties shown to the lender as follows:

> 1. Both Larry Ramos and his wife Santa Morales have a joint interest over the edifice constructed on said land. This property is where the couple maintain their residence, having a joint ownership interest in said property, which interest is fully enforceable under the real property laws of the Commonwealth of Puerto Rico. Said property rights or interests may be encumbered by Larry Ramos and Santa Morales without reference to any other person.
>
> 2. With regards to the other parcel of land, mister Larry Ramos was given a legal mandate by the registered joint title owners, Santos Ramos and wife. This legal mandate conveyed to Larry Ramos a legally cognizable interest in the property and full authority to encumber the property for the purposes of funding the activities of Renacer Broadcasters Corporation.

Id., pages 1-2. According to Sotomayor, the fact that the property interests are not recorded with the Department of the Treasury for tax purposes does not affect the "legal rights and interests of Larry Ramos and/or Santa Morales, to make available said properties to a loaning institution." *Id.*, page 3.

5. In describing the property interest of Larry Ramos and Santa Morales, Sotomayor appears to treat the house and the land as separate interests. He has said Larry and his wife have a joint interest in the edifice but has been less than clear about the land on which the edifice stands. Santa Morales also appears to distinguish between house and land in her October 16, 1990, Declaration, Attachment 5 to Renacer's Opposition. She says:

> 3. I testified at my depositions and again at hearing that it was my understanding that Larry Ramos promised the bank a mortgage on the property where we live. I never testified that he promised to mortgage our home.
>
> 4. I did not know I was supposed to register my interest in the property I jointly own with Larry Ramos with the Treasury Department. However, I understand from Renacer's local attorney, Victor Sotomayor, even though I have not registered my interest in the properties, Larry Ramos, with my consent, still has the legal authority to pledge the property as security for a loan.

6. In rebuttal Bonet submitted the November 5, 1990, Sworn Statement of Miguel A. Merle, who said he investigated and verified the property at the address Larry

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[4] In his Declaration, Larry Ramos said:

> I did not know I was supposed to register my interest in these properties with the Treasury Department. However, I understand from Renacer's local attorney, Victor Sotomayor, even though I have not registered my interest in the properties, I still have the legal authority to pledge the properties as security for a loan.

Ramos and Santa Morales each gave as a home address. *See* Tr. 80, 250. According to Merle, this property has two houses. He also said:

> FOURTH: That I also went to the Registry of the Properties in San German, Puerto Rico were [sic] the official books of Lajas property are located and this property coincides with the property inscribed at page 244, book 185 Lajas property number 6,707, belong to Mr. Castolino Ramos and his wife Angelica Rodriguez.
>
> FIFTH: That I hereby do certify that there are no property in the name of Larry Ramos nor Santa Morales in the Registry of the Property, San German Section.

Castolino Ramos is the name of Larry Ramos' father. Castolino Ramos and Larry's brother Santos live in the house next door to Larry and Santa Morales. Tr. 138.

7. Renacer did not respond to the substance of the Merle Statement. In a Motion to Strike, Renacer argued that the statement contains new allegations to which Renacer had not had an opportunity to respond, contained blatantly false information in conflict with the Sotomayor legal opinion and constituted hearsay, lacked the specificity required by 47 C.F.R. § 1.229(d), and was improperly notarized by another party to the proceeding with an interest in the outcome. Renacer reserved the right to respond substantively if necessary.

8. The ALJ found the Sotomayor legal opinion and the declarations submitted with Renacer's opposition sufficient to explain the discrepancy in the tax records, and he denied Bonet's motion. He did not address the Merle Sworn Statement about property records and did not act on the Motion to Strike, which was mooted by his ruling.

DISCUSSION

9. Section 1.229(b) of the Commission's Rules, 47 C.F.R. § 1.229(b), provides that motions to enlarge hearing issues not filed within thirty days of *Federal Register* publication of the hearing designation order must be accompanied by a showing of good cause for the delay in filing. An important consideration is the movant's due diligence in timely discovering the alleged facts. *See Kaye-Smith Enterprises*, 98 FCC 2d 675, 686 (Rev. Bd. 1984) (subsequent history omitted). Bonet argued below that his post-hearing motion was timely because it was based in part on the hearing transcript he had received only shortly before filing the motion. But, the information from public records relevant to the property ownership of Larry Ramos and Santa Morales could have been secured after their depositions were taken in April 1990. It was in his deposition, not his hearing testimony, that Ramos said he was relying for his financial qualifications on a loan to be secured by property he owns or owns jointly with his brother. Santa Morales testified in her deposition as well as her hearing testimony that she consented to mortgaging the property where she lives for the station. The certificates Bonet submitted from the Department of the Treasury were dated August 27, 1990, and the Merle Sworn Statement was dated November 5, 1990, and not filed until Bonet's reply. Under these circumstances, the Board cannot find that Bonet satisfied the due diligence requirement.[5]

10. Nonetheless, even in the absence of good cause for the late filing, a motion to enlarge will be considered if it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing. 47 C.F.R. § 1.229(c).[6] The issue raised here, Larry Ramos' candor in claiming ownership of property Renacer plans to use for securing a loan for the proposed station, goes to Renacer's basic qualifications and, therefore, meets the substantial public importance test. *See Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4332 ¶9 (1991). As the Commission has made clear in its *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210 (1986) (subsequent history omitted), "the trait of 'truthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest."

11. In considering the showing of probable decisional significance, the Board must find that the likelihood of proving the allegations is so substantial as to outweigh the public interest benefits of proceeding to an orderly conclusion in this proceeding. *See Great Lakes, supra*, citing *The Edgefield-Saluda Radio Company*, 5 FCC Rcd 148, 148-49 (Rev. Bd. 1966).[7] A remand is appropriate only if the Board finds a likelihood that potentially disqualifying issues will be proven, a test met in this case. When Bonet showed that, although Larry Ramos claimed to "own" property, there is no public record of such ownership in either the Treasury Department which collects property taxes or the Registry of Properties for the area where the property is located,[8] he made a prima facie case. Distinctions by Renacer's counsel between recorded and actual interests did not eliminate questions about what Larry Ramos has claimed are his ownership interests in property.

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[5] We do note that, unlike the situation in *Omaha TV 15, Inc.*, 4 FCC Rcd 730, 731 ¶¶7-8 (1988), there was no designated issue in this case under which Bonet could have explored Ramos' claimed property ownership at hearing.

[6] The Board does not look with favor on parties who delay providing relevant evidence until a reply pleading. However, because of the serious nature of the information in the Merle Sworn Statement as it relates to Renacer's candor, we have considered it. *See East St. Louis Broadcasting Co.*, 9 FCC 2d 212, 213 n.2 (Rev. Bd. 1967).

[7] In *Great Lakes* the Commission directed the Board and the ALJs to "strictly enforce the provisions of Section 1.229, including the requirement that petitions to enlarge issues rely on evidence that is new and that could not reasonably have been discovered earlier, in order to expedite the hearing process and the institution of new service." 6 FCC Rcd at 4333 ¶15. But when assertions of lack of candor are sufficiently demonstrated, they must be examined at hearing, even if grossly untimely. *See, e.g., David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (1991) (court remanded case for hearing on candor question not raised before Board or Commission).

[8] Bonet included an additional affidavit to the same effect with his exceptions. Ruben Baez Dixon, who is in the business of doing title searches, swore on August 13, 1991, that in July and August 1990 he "searched for properties owned by Larry Ramos, Santa Morales and/or Renacer Corporation. I was unable to locate any real property owned by said parties; nor did I find any record of any of them paying real property taxes."

12. At his deposition, Ramos very clearly attempted to convey the impression that Renacer's claim to financial qualification was based upon his ability to carry the project of the radio station personally because of "the properties I have." Deposition Tr. 42. He went so far as to say that he had shown Renacer's lender "title deeds" to property owned by "myself." Deposition Tr. 44. But, subsequent exchanges cast strong doubts on the veracity of these statements. Later during this same deposition, when asked if anyone else had any interest in the properties, Ramos testified that he jointly holds one property with his brother. Deposition Tr. 68. Only later, in his October 16, 1990, Declaration under penalty of perjury did Ramos disclose that his brother's wife also has an interest in this same property. Attachment 4 to Renacer's Opposition. But, Ramos still claimed that he jointly owns the property, albeit with his brother Santos Ramos and Santos' wife. According to Renacer's local counsel, however, Larry's brother Santos and Santos' wife are the "registered joint title owners" and Larry has only a "legal mandate" from the owners to encumber the property for funding Renacer. Sotomayor Legal Opinion at p. 1. The term "legal mandate" is not defined by Sotomayor, but Bonet's characterization of it as a power of attorney is unchallenged. Santos Ramos said in his October 18, 1990, Declaration under penalty of perjury that, although he and his wife had given Larry Ramos authority to pledge the property as security for Renacer's loan, "we never thought that anyone would require us to register our transfer of ownership interest in the property to Larry." Attachment 6 to Renacer Opposition.

13. The other piece of property to which he asserted ownership and a title that he can use as security with the lender is the property where he lives with his wife, Santa Morales, and in which, as it turns out, she has an ownership interest. Exactly what Larry (or Larry and his wife) own is not clear, however. In his Legal Opinion, Sotomayor says without qualification that "Larry Ramos and his wife Santa Morales have a joint interest over the edifice" but is carefully vague about what their interest might be in the land on which the edifice sits.[9] He is clear that whatever property rights or interests there are "may be encumbered" by Ramos *and* his wife. In both her deposition and at the August 1990 hearing, Santa Morales testified that she consented to mortgaging the property where she lives for Renacer but, curiously, in her October 1990 Declaration said, "I never testified that he promised to mortgage our home." According to affidavits from Bonet, records at the Registry of Properties show that property at the address where Larry and his wife testified they live is registered to Castolino Ramos and *his* wife. Castolino is Larry's father and next door neighbor and is a broadcaster. *See* Tr. 115-119, 296-97.

14. On the record before us, there clearly is a substantial and material question about just what ownership interests Larry Ramos has and whether he can provide the lender with title deeds to property he owns. We have considered whether mere dominion over the property to which he claims ownership is sufficient to resolve the ownership question in his favor and, therefore, whether it is sufficient for a finding that Ramos did not lack candor in describing his ownership interests or did not willfully misrepresent them in this proceeding, and we conclude that it is not. First, Larry Ramos may not have the clear right to encumber the property that he claims.[10] He does not have his wife's consent to mortgage "our home." Declaration of Santa Morales Toro, and his brother has expressed what can be read as reluctance to register Larry's "interest" in the property Santos owns with his wife--whose views about mortgaging her home have not been provided. Declaration of Santos Ramos. Second, the reliability of Larry Ramos' ownership claims is at issue. Even if he can rely on others to make their own property interests available to him for securing Renacer's loan, he has claimed under oath that the property is his and that he has shown the lender "title deeds" to his property. Deposition Tr. 44. As the Commission recently emphasized in *Richardson Broadcast Group*, 7 FCC Rcd _____, slip op. at 3 ¶9 (FCC 92-62, released Feb. 24, 1992), intentional deceit can lead to disqualification, even if the discrepancies are not significant in and of themselves. Finally, Renacer relies strongly on the distinction in Sotomayor's Legal Opinion between ownership interests and recording property for tax purposes, but Sotomayor did not address any requirements to register property ownership or the effect of the lack of ownership registration on the rights of third parties, such as lenders. Sotomayor also did not explain whether a third party lending money to someone could rely on property tendered pursuant to an unrecorded legal mandate as security. In opposing Bonet's exception, Renacer made a passing reference to the Notarial Act for conveying property, but it neither explained the Act nor explained why a notary executing title deeds would not have advised the Treasury Department of any property transfer.

15. In *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132 (D.C. Cir. 1985), the Court chided the Board for excusing an applicant's claim to real estate ownership despite his lack of clear title and notwithstanding his counsel's legal opinion that the applicant could claim "dominion and control" over the property.[11] Here, although Renacer has offered a legal opinion that Ramos does have certain

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[9] We find it interesting that Sotomayor described Ramos and his wife as "joint title owners" for their property.

[10] With respect to claims of real estate ownership to be used as a station financial resource, the Board has warned:

> Whatever the posture of state equity law on the subject, however, we are somewhat disquieted by an applicant's listing of ownership in an asset with full knowledge that technical legal title thereto is in another. When an asset is listed as owned in a submission to the Commission, we expect "ownership" to be synonymous with legal title. Anything less, if not adequately explained, invites needless suspicion and accusation, as this case so aptly illustrates.

WHW Enterprises, Inc., 89 FCC 2d 799, 807 (Rev. Bd. 1982), *review denied*, FCC 83-368, released September 15, 1983, *aff'd in part, reversed in part and remanded*, 753 F.2d 1132 (D.C. Cir. 1985). The court was "more than disquieted" by the applicant's claim to ownership without legal title. 753 F.2d at 1144.

[11] *Cf. Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5192 (1991) (assets not credited, in part, because mother and sister had property interests in subject land).

rights to pledge property and that, in the opinion of Renacer's local counsel, Ramos has not really misrepresented his interests, the Board finds on the basis of all the information before it that there is sufficient doubt of Ramos' truthfulness about his property interests. Thus, further inquiry is needed before the Board can make the public interest finding required for granting a license by 47 U.S.C. § 309(a). As the court directed in *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985), when shown a good deal of smoke, "the Commission must look into the possible existence of a fire." Furthermore, given the importance of truthfulness and candor in an applicant's testimony, including deposition testimony, Larry Ramos' claim to property ownership should be "tested in the crucible of an evidentiary hearing." *WCVQ, Inc.*, 5 FCC Rcd 3824, 3825 ¶10 (1990).

16. ACCORDINGLY, IT IS ORDERED That this proceeding is remanded to the presiding ALJ for further hearing and preparation of a supplemental initial decision on the following issue:

> To determine whether Renacer Broadcasters Corporation was lacking in candor or made intentional misrepresentations with respect to Larry Ramos' claim to own property and the effect thereon on that applicant's basic qualifications to be a Commission licensee.

17. IT IS FURTHER ORDERED That the burden of proceeding SHALL BE on Guillermo A. Bonet and the burden of proof SHALL BE on Renacer Broadcasters Corporation.

18. IT IS FURTHER ORDERED That the application of Occidental Broadcasting Corporation, File No. BPH-871029MM, IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: March 20, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Paul Butcher, 8330-O
President 91111050, 91120461
Big Sandy TV Cable
Box 956
Paintsville, KY 41240

Dear Mr. Butcher:

This letter constitutes an admonishment for failure to comply with Section 76.221(c) of the Commission's rules, which requires cable systems to include a sponsorship identification on any paid political announcement presented on an origination cable channel. 47 C.F.R. Section 76.221(c).

This action results from the cablecast of two political advertisements for candidates for local office during your system's Community Bulletin Board on October 31, 1991, between 8:00 and 8:02 p.m. The first advertisement urged viewers to vote for Pat Sizemore for Mayor, and the second supported the election of Carl Castle for Mayor, and Johnny Slone, Jackie Hall, and Sharon Collins for Commissioners. Neither advertisement included a sponsorship identification. We, therefore, inquired in a letter dated December 4, 1991, whether they were paid for and, if so, whether the announcement required by Section 76.221(c) was made.

In your December 13, 1991, response, you stated that the advertisements in question were paid for, and by whom. You also explained that sponsorship identifications were not included because a new employee, who was "just learning the system," failed to include the required language. You indicated that "[w]e... are now running an advertisement stating that the advertisements in question were paid for by the candidates." It thus appears that you are now fully aware of your cable system's obligation to include a sponsorship identification(s) on all paid political matter. Based on the foregoing, we find that Big Sandy TV Cable violated Section 76.221(c) of the Commission's rules by airing paid political announcements on an origination channel without the requisite sponsorship identification. Your explanation of the reason for not including sponsorship identifications (the presence of a new employee) and your efforts to correct these omissions do not excuse the violations. However, because of the relatively minor nature of the violations, we will only admonish you for your actions. You are advised, however, that any future failure to include a sponsorship identification may result in a monetary forfeiture.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. *See* Commission Rule 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In The Matter of

Commission Requirements
for Cost Support Material
To Be Filed with 1992 Annual
Access Tariffs

Petitions for Waivers

ORDER

Adopted: March 19, 1992; Released: March 20, 1992

By the Chief, Common Carrier Bureau:

INTRODUCTION

1. On February 10, 1992, this Bureau released an Order in the above-captioned proceeding to establish the Tariff Review Plan (TRP) for annual access tariff filings to be made by local exchange carriers (LECs) on April 2, 1992.[1] The *1992 TRP Order* provided TRP formats for price cap LECs and Tier 1 and Tier 2 rate of return companies, described changes from previous TRPs, and set a calendar for the access tariff proceeding. It noted that we strongly discourage carriers' use of errata filings, and set February 20, 1992, as the filing date for any waiver requests.

2. In response to the *1992 TRP Order*, waiver requests were filed by the Ameritech Operating Companies (Ameritech), Nevada Bell (Nevada), and US West Communications, Inc. (US West). A reply was filed by NYNEX Telephone Companies (NYNEX). In this Order, we address all waiver requests.

II. ISSUES

A. Display of ONA Data

3. Ameritech requests a waiver of the requirement that it calculate "current rates times demand" in chart RTE using bundled historical Feature Group (FG) demand. Reporting the data in this manner, Ameritech avers, will result in a change in the local switching service band index (SBI) and the traffic sensitive actual price index (API) even if rates are held constant. These indexes, Ameritech notes, were designed to change only when rates were changed, not when demand changed. Ameritech requests that it be allowed to use recast historical FG demand in the computation of this item. In its reply, NYNEX supports Ameritech's request, noting that the method specified in the *1992 TRP Order* for the display of Ameritech's local switching rates could arguably apply to other rates restructured during the base period.

4. The instructions in the *1992 TRP Order* for the display by Ameritech of its local switching rates apply only to Ameritech's local switching rates. The display requirements for these rates differ because of the different requirements placed on Open Network Architecture (ONA) rates by the *Part 69 ONA Order*.[2]

5. The *Part 69 ONA Order* required the unbundling of local switching FG rates into Basic Service Arrangement (BSA) and Basic Service Element (BSE) rates. LECs were required, *inter alia*, to set their ONA rates to achieve revenue neutrality, *i.e.*, set BSA rates so that the sum of historical base period FG demand times FG rates would equal recast historical base period FG demand times BSA and BSE rates. Ameritech's initial ONA filing demonstrated this revenue neutrality using calendar 1990 demand as the base period demand. This year's annual access tariff filing will use calendar 1991 demand as the base period demand.

6. The *Part 69 ONA Order* also required, at the time ONA rates were incorporated into the actual price indexes (APIs) and service band indexes (SBIs), that the LECs would develop base period BSA and BSE demand using both recast base period FG demand and historical BSA and BSE demand. In order to assess the recasting of historical FG demand, the TRP requires Ameritech to display revenue and demand for both the individual FG rate elements and for the FG demand recast into BSA and BSE demand. Since this is simply two ways of expressing historical revenue data, the *1992 TRP Order* directed Ameritech to include only the revenue from the bundled historical FG demand in the total local switching and traffic sensitive revenues.

7. If Ameritech is maintaining the revenue neutrality of the ONA rates, the revenue computed from the bundled historical FG demand should be the same as the revenue from the recast historical FG demand. These two will differ only if the demands for the FG rate elements have grown from calendar 1990 to calendar 1991 at different rates, or if Ameritech is using a different method to recast its FG demand than it used in its initial ONA filing.

8. The *Part 69 ONA Order* required revenue neutrality of the ONA rate elements. When the ONA rates are incorporated into the indexes, Ameritech must again demonstrate revenue neutrality, at the 1991 levels of demand. This may require Ameritech to adjust its BSA rates to prevent the traffic sensitive API and local switching SBI from changing. This occurs because of the revenue neutrality requirement of the *Part 69 ONA Order*. In order for us to ensure compliance with these revenue neutrality requirements we conclude that Ameritech must display ONA revenue data as required in the *1992 TRP Order*. We therefore deny Ameritech's request for waiver.

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[1] Commission Requirements for Cost Support Material To Be Filed with 1992 Annual Access Tariffs, Order, DA 92-174, released Feb. 10, 1992 (Com.Car.Bur.) (*1992 TRP Order*).

[2] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*).

B. Nevada's Interexchange Basket

9. Nevada requests a waiver of the requirement that it maintain its interstate interLATA toll services in a separate basket, and of those portions of the TRP dealing with the interexchange basket. Nevada notes that in August 1986, the Commission authorized it to incorporate AT&T's MTS rates and regulations by reference. Thus, Nevada claims, its interexchange rates are effectively capped by AT&T's price cap. Further, it notes that this basket has approximately $7,000 of revenue, and that the service is provided to only about 50 customers. Thus, the revenue effect is minimal. Finally, it notes that the Bureau previously granted a waiver in analogous circumstances on the grounds that the Bureau did not intend "to require carriers to file TRPs for access elements for which they do not file tariffs."[3]

10. We disagree with Nevada's contention that this basket is unnecesary to protect its ratepayers, even though its rates currently reference AT&T's rates. AT&T's rates will be set based on AT&T's PCI. Although both AT&T's and Nevada's interexchange PCIs are adjusted for Gross National Product Price Index (GNP-PI) minus 3 percent, it is not clear that the changes in the PCIs which result from AT&T's and Nevada's exogenous changes and access charge changes will result in equivalent changes in the PCIs for Nevada and AT&T. We therefore reject Nevada's request.

11. The previously granted "waiver" which Nevada notes was actually a decision that no waiver was needed, because the company in question filed only an end user tariff, and was a member of National Exchange Carrier Association pools for the other access elements. Because Nevada actually files a tariff for its interexchange rates, it must continue to provide the cost support required by our rules.

C. Use of GNP-PI

12. US West notes that the 45-day estimate of the GNP-PI, which the carriers are required by the price cap rules to use to develop their Price Cap Indexes (PCIs) will not be released in time for the carriers to use in developing their filings. It requests that it be allowed to use the GDP-PI (Gross Domestic Product Price Index) instead. In its reply, NYNEX supports US West's request.

13. Our discussions with Commerce Department staff who release the GNP-PI indicate that the 45-day estimate of the GNP-PI will indeed not be available. The Commerce Department is currently revising the national income product account statistics it releases, including the GNP-PI. As part of this revision, the Commerce Department is changing from an emphasis on gross national product to an emphasis on gross domestic product. As a result, there will be a 45-day estimate of the GDP-PI, but there will be only the 75-day estimate of the GNP-PI.

14. For the purpose of preparing their filings, LECs may use the fourth quarter 1991 over fourth quarter 1990 growth in the GDP-PI in place of the GNP-PI. Because the national income accounting concepts on which these two indexes are based are very similar, we expect them to be approximately equal. However, the exact relationship between these two indexes is unclear at this time. Therefore, when the 75-day estimate of the GNP-PI is released, adjustments must be made to the filings to reflect the inflation rate as measured by the GNP-PI, if this inflation rate differs from the inflation rate computed from the GDP-PI. To minimize the number of filings, and because any adjustment should be a straightforward process, these adjustments shall be made at the time of the true-up filings following our Order releasing the results of our review of the access filings.

D. Miscellaneous

15. One page was inadvertently omitted from Chart COS-1(P) in the Tier 1 TRP. Attachment A contains the omitted page. Attachment B contains a description of the procedures to be used to file the annual access charge tariffs.

III. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED that the waiver requests of the above-referenced local exchange carriers ARE GRANTED to the extent discussed herein, and ARE OTHERWISE DISMISSED OR DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[3] Nevada Petition at 4, citing Commission Requirements for Cost Support Material To Be Filed With Annual Access Tariffs, Order, 6 FCC Rcd 1641, 1642 (1991) (*1991 TRP Waiver Order*).

Attachment A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)
)
Commission Requirements)
for Cost Support Material)
To Be Filed with 1992 Annual)
Access Tariffs)

Petitions for Waivers)

COS-1(P)

FCC REPORT 43-01 April 1990
ARMIS QUARTERLY REPORT

Approved by OMB Rev.
3060-0395
Expires 10/31/90

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmm yyyy to mmm yyyy TABLE I
COSA: xxxx PAGE 3.2 OF 3.7

TABLE I - COST AND REVENUE TABLE
(Dollars in thousands)

Row	Classification (a)	All Other Adjustments (e)	Subject to Separations (f)	State (g)
	Other Investments			
1705	Other Jurisdictional Assets-Net			
1710	Property Held for Future Use			
1720	Plant Under Construction			
1730	Plant Acquisition Adjustment			
1740	Investment in Nonaffiliated Cos			
1750	Other Deferred Charges			
1760	Inventories			
1770	Cash Working Capital	N/A	N/A	N/A
1780	FCC Investment Adjustment	N/A	N/A	N/A
1790	Total Other Investments			
	Reserves			
1820	Accumulated Depreciation			
1830	Accumulated Amortization			
1840	Deferred FIT			
1850	Customer Deposits			
1870	Other Deferred Credits			
1880	Other Juris Liab & Deferr Crs-Net			
1885	FCC Reserve Adjustment	N/A	N/A	N/A
1890	Total Reserves			
	Return Data			
1910	Average Net Investment	N/A		
1915	Net Return	N/A	N/A	N/A
1920	Rate of Return	N/A	N/A	N/A
1925	FCC Ordered Refund	N/A	N/A	N/A
1926	Refund Adjusted for Taxes	N/A	N/A	N/A
1930	Net Return Including FCC Refund	N/A	N/A	N/A
1935	Rate of Return (including refund)	N/A	N/A	N/A
	Miscellaneous Data			
1950	Lifeline Adjustment	N/A		
1960	Universal Service Fund	N/A		
1970	Common Line Support-Long Term	N/A	N/A	N/A
1980	Common Line Support-Transitional	N/A	N/A	N/A

Attachment B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)
	)
Commission Requirements	)
for Cost Support Material	)
To Be Filed with 1992 Annual	)
Access Tariffs	)
	)
Petitions for Waivers	)

PROCEDURES FOR 1992 ANNUAL ACCESS CHARGE TARIFFS
TO BE FILED ON OR BEFORE APRIL 2, 1992

Local exchange carriers (LECs) are required by Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to file new access charge tariffs or revisions to existing tariffs to be effective July 1, 1992 on not less than 90 days' notice. Therefore, the Common Carrier Bureau anticipates receiving these filings on or before April 2, 1992. In this Attachment, we provide details on the specific procedures to be followed when submitting these filings to the Commission.

GENERAL

Interested parties are reminded that these filings and the associated review and analysis are not part of a docketed proceeding. Therefore, until further notice, all correspondence and pleadings (other than tariff filings) in connection with these filings should not bear any docket number but must instead bear the designation "1992 ANNUAL ACCESS CHARGE TARIFF FILINGS." All such correspondence and pleadings must be submitted with an original and 10 copies. A copy must also be served on the Commission's Commercial Contractor, Downtown Copy Center (DCC), Room 246, 1919 M Street, N.W.

TARIFF FILINGS

LECs submitting tariff filings should consult the attached schedule which details the number of copies required and the location to which those copies should be delivered. Carriers are especially reminded that (1) the appropriate tariff filing fee of $490 must be submitted to Mellon Bank, and (2) they must serve a copy on DCC. Those annual access filings submitted on April 2, 1992 must be delivered to DCC at the Commission in Room 535, 1919 M Street, N.W.

Carriers, whether filing their own individual tariffs or not, are reminded of the customer notification requirements as outlined in Section 61.58(a)(4) of the Commission's Rules, 47 C.F.R. § 61.58 (a)(4), concerning rate increases in particular. Carriers are further reminded that the purpose of such notification is to afford any affected customer sufficient opportunity to comment on the tariff filing within the time period established for filing petitions in Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773.

In an effort to facilitate identification and cataloging of the tariff filings, the LECs should:

1. Clearly label any package of revised tariff pages as such, e.g.: BELL ATLANTIC, STATE, TRANS. LTR. #XXX, DATE, REVISED TARIFF PAGES. These revised pages or any completely new tariff should not be submitted in a binder but should be hole-punched for a 3-ring loose leaf binder.

2. Provide a list identifying all cost support volumes submitted with these revisions and associate the list with the cost volumes and the transmittal letter.

3. Clearly label all boxes containing cost support volumes as to their contents, e.g.: BELL ATLANTIC, STATE, TRANS. LTR. #XXX, DATE, VOLS. 1, 2, 3,4, BOX 1 of 5.

4. Submit cost support material in a 3-ring binder pursuant to Public Notice dated December 13, 1986, DA 86-337, and label the volumes of cost support on the spine of the binder with the name of the carrier, the transmittal number, the subject of the filing, the volume number and the date of the filing. For example: BELL ATLANTIC, TRANS. LTR. #XXX, 1992 ACCESS CHARGE TARIFF FILING, VOL. 2-2 OF 2, APR. 2, 1992.

5. Each carrier should submit its respective Tariff Review Plan and Certification in a separately bound package as required by Commission Requirements for Cost Support Material To Be Filed with 1992 Annual Access Tariffs, Order, DA 92-174, released February 10, 1992.

6. In addition to the paper copies, all companies must submit their Tariff Review Plan information in four copies on computer "floppy disks". Price cap carriers must submit their data in LOTUS 1-2-3, Release 3.1 format, using the Analyzer spreadsheet provided by the Bureau. The file shall be named COSAAN92, where "COSA" is the company study area code. The full rate detail spreadsheet shall be provided in a separate Lotus 1-2-3, Release 3.1 spreadsheet format, named COSAA92R, where "COSA" is the company's study area code. These files shall be submitted on either 5 1/4 or 3 1/2 inch high density floppy disks. Tier 1 and Tier 2 rate or return carriers should follow the rules for submission of data to the Commission on magnetic media contained in the 1989 Tariff Review Plan (TRP). These carriers should also follow the technical documentation from the 1989 TRP, appropriately updated, for all TRP charts except COS-1(P), COS-6(P) and COS-7(P), for which the carriers should use the documentation for ARMIS reports 43-01, 43-03, and 43-04, respectively. For filing charts COS-1(P), COS-6(P) and COS-7(P), on diskettes, carriers should follow the instructions for ARMIS report 43-01, 43-03, and 43-04, respectively. As indicated in the Attachment to this Notice, one copy of the "floppy disks" should be filed with Mark Uretsky, Tariff Review Branch in Room 514. One copy should be filed with Barbara Van Hagen, Accounting and Audits Division, 2000 L St., N.W., Room 812, and the third copy should be filed with Peyton Wynns, Industry Analysis Division, 1250 23rd St., N.W., Room 10.

PETITIONS AND REPLIES

Petitions concerning these tariffs will be due April 29, 1992 regardless of whether the tariff revisions are submitted on or before April 2, 1992. Replies may be filed only by the publishing carriers and will be due on May 14, 1992. Petitioning parties should reference the general designation as outlined above or the specific tariff and transmittal number, and not a docket number. Petitions should be

organized where possible so as to present comments in a modular form, section-by-section, for ease of analysis. An original and 10 copies of any petition or reply must be filed with the Commission and a copy must be served simultaneously upon the publishing carrier or petitioner. Additionally, DCC must be served with a copy in Room 246, 1919 M Street, N.W.

Members of the general public may submit one copy of their comments, without regard to form, by letter to the Secretary. These comments should specify that they concern the 1992 Annual Access Tariff Filings or a specific tariff transmittal.

PUBLIC INFORMATION

Tariffs filed with the Commission, related correspondence, petitions, and replies concerning the 1992 Annual Access Charge Tariff Filings may be examined by the public from 1:30-4:30 p.m., Monday through Friday, in Room 513, 1919 M Street, N.W., Washington, D.C.

Copies of tariffs, petitions, and other related filings may be obtained from the Commission's Commercial Contractor, DCC. Parties should contact Virginia Cannon of DCC at (202) 452-1422.

For further information, contact: Judith A. Nitsche, Tariff Review Branch (202) 632-5550

ANNUAL 1992 ACCESS CHARGE TARIFF FILING

OFFICIAL COPIES	TRANS LETTER	REVISED TARIFF PAGES	Tariff Review Plan HARD COPY	Tariff Review Plan DISKETTE	VOL. 1 D&J ONLY	COST SUPPORT VOL. 1 D&J PLUS REMAINDER OF COST MATERIAL
SECRETARY'S OFFICE - ROOM 222	1	2	-	-	-	-
PUBLIC REFERENCE ROOM	1	1	-	-	-	-
DCC - ROOM 246 1919 M ST., N.W.	1	1	1	1	-	1
COURTESY COPIES						
JOHN CIMKO ROOM 514	1	-	-	-	1	-
ANN STEVENS ROOM 514	1	-	-	-	1	-
JUDY NITSCHE ROOM 514	1	1	-	-	1	-
MARK URETSKY ROOM 514	1	-	2	1	-	2
PEYTON WYNNS 1250 23rd St., N.W. ROOM 10	-	-	-	1	-	-
Barbara Van Hagen ACCTG & AUDITS DIVISION 2000 L ST., N.W. ROOM 812	1	1	1	1	-	1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US WEST COMMUNICATIONS and GILA RIVER TELECOMMUNICATIONS, INC.

Joint Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules

GILA RIVER TELECOMMUNICATIONS, INC.

Petition for Declaration of Inapplicability or, Alternatively, for Waiver, of Section 61.41(c) and Section 69.3(e) (11) of the Commission's Rules

AAD 91-2

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1992; Released: March 24, 1992

By the Chief, Common Carrier Bureau:

1. In this Order we consider two petitions filed by parties involved in an acquisition of one exchange by a newly-formed telephone company. The first petition, which we grant herein, is a petition filed by the two companies jointly, requesting a change in study area definition and a waiver of certain other rules. The second petition, which we grant as well, is filed by the acquiring company, and requests exemption from price cap regulation. These petitions are discussed *seriatim* below.

I. JOINT PETITION

A. Introduction and Background

2. On December 7, 1990, US West Communications (US West) and Gila River Telecommunications, Inc. (Gila River) filed a joint petition seeking waiver of Part 36 of the Commission's Rules in conjunction with the sale by US West to Gila River of the Sacaton exchange in Arizona.[1] In the joint petition, US West and Gila River seek a waiver of Part 36 of the Commission's Rules relating to the definition of "study area." The parties also requested waiver of Part 36 as it relates to calculation of the Subscriber Plant Factor (SPF) and a separations factor for local switching equipment for a transitional period. For the reasons discussed below, we grant the requested waivers.

3. US West's Sacaton exchange is located in the Gila River Indian Reservation in Arizona. Gila River Telecommunications, Inc. is a corporation chartered by and under the sovereign laws of the Gila River Indian Community; the majority of Gila River's stock is held by the Community. Gila River was incorporated to provide wireline telephone service and other telecommunications services on the Reservation, as part of the Tribe's economic self-determination. The purchase made by Gila River from US West consists of a single analog exchange serving 562 access lines on the Reservation. This acquisition was approved by the Arizona Corporation Commission on June 6, 1990. Gila River plans to extend service to over 600 additional, previously unserved, customers, and to deploy all digital exchanges.

4. The definition of study area contained in Part 36, Appendix-Glossary,[2] of the Commission's Rules states that study area boundaries shall be frozen as they were on November 15, 1984. US West requests a waiver of that provision to remove the Sacaton exchange from its existing Arizona study area. Concurrently, Gila River, a newly incorporated telephone carrier, requests a waiver to establish a new study area for this exchange.

B. Issue Analysis

5. The Joint Petition requests waiver of the Commission's definition of study areas. The Commission has three primary concerns in study area boundary change petitions: first, that the change have no adverse impact on the Universal Service Fund (USF) support program;[3] second, that the state commission(s) having regulatory authority have no objection to the change;[4] and finally, there is strong public interest support for a waiver.

1. Impact on USF Support

6. US West states that it serves approximately 1.8 million access lines in the state of Arizona, of which 562 are in the Sacaton exchange. It states that it did not receive any high cost support for its Arizona study area before the sale of Sacaton. US West notes that the average loop cost for its entire study area prior to the sale was $255.54; without the Sacaton exchange, the average loop cost revenue requirement would decrease by about $0.13 per

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[1] By *Public Notice* released March 7, 1991, 6 FCC Rcd 1407, we invited comments on the joint petition. No comments were received. US West filed a letter of clarification regarding loop cost information. Letter from G. Michael Crumling, Director, Federal Relations, US West, to Jacqueline Spindler, Deputy Branch Chief, Cost Analysis Branch, December 13, 1991.

[2] 47 C.F.R. Part 36, Appendix-Glossary.

[3] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 at para. 65 (December 12, 1984) (*Joint Board Order*).

[4] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

loop.[5] Since the exclusion of this exchange would reduce its average loop cost, US West concludes that this transaction will have no adverse impact on the USF.

7. Gila River indicates that its unseparated cost per loop for the Sacaton exchange will be approximately $469.49 after the sale, and states that it expects the number of access lines to grow from 562 by the end of 1990 to 889 by the end of 1991, and approximately 1900 within five years.[6] Gila River states that it will receive no high cost support in 1991, but estimates that it will receive $169,155 in 1992. In further support of the joint waiver request, Gila River notes that it and US West are separate and distinct corporate entities with no business affiliations. Gila River states that the benefits of its purchase of the Sacaton exchange include: (a) the initiation of service within five years to over 600 customers not presently served; b) the phased-in construction of a new central office to serve the Gila River Indian Reservation, presently served from eight different US West exchanges;[7] and c) the introduction of new service offerings including an optional calling plan (OCP) to expand the calling area to the entire reservation. Gila River also notes that it intends to increase the local residential rates from $8.30 to $15.00 per month when the Sacaton exchange is completely upgraded, and to charge $30.00 per month for the OCP.

8. In 1984 the Commission defined study areas to include the operations of an individual telephone company within a state, and determined that high cost assistance should be calculated separately for each study area. In freezing study areas at their 1984 boundaries, the Commission sought, among other things, to prevent companies from setting up high cost exchanges within their existing service territories as separate companies in order to maximize high cost support.[8] The Commission stated that an area in which telephone service was instituted for the first time could be treated as a separate study area if it was separately incorporated, but prohibited companies from setting up separate companies within their existing service areas for the purpose of increasing the high cost assistance they received. Based on the Commission's policy, we will consider a waiver request even if the proposed change will increase high cost assistance for those exchanges, as this change will, if the carriers demonstrate the unique circumstances supporting establishment of a separate study area, and show how this separate study area will promote the penetration of service into new territories. We will also consider the reasonableness of the carrier's effort to recover its costs through local rates.

2. State Commission and Tribal Council Approval

9. Gila River states that although US West furnished telephone service within the boundaries of the Gila River Indian Reservation as an extension of its existing service area and as a convenience to the Reservation, US West never received a franchise from the Gila River Indian Community Tribal Council (Tribal Council). The Tribal Council functions as the regulatory agency responsible for telephone service in the Gila River Indian Reservation. On December 31, 1988, the Tribal Council issued a Certificate of Convenience and Necessity to Gila River. Gila River began service to the Reservation on February 1, 1989. On June 6, 1990, the Arizona Corporation Commission (ACC) authorized US West to sell the Sacaton exchange to Gila River.[9] Under this arrangement, US West has relinquished its provision of service to the Gila River Indian Reservation, and sold its equipment and facilities to Gila River.[10] Moreover, neither the Tribal Council nor the ACC opposed the waiver request when we sought comment on the waiver.

3. Public Interest Concerns

10. Gila River states that it will construct a new central office to provide service into presently unserved territories, resulting in over 600 new subscribers (approximately 100 percent increase in total customers) within five years. It indicates that customers presently served out of eight separate US West exchanges will obtain service from the new Gila River switch. Furthermore, the company intends to upgrade offerings to customers on the Reservation. We also find it appropriate that Gila River proposes to increase the level of local rates to support the proposed upgrade.

11. There is a strong public interest in providing telephone service where it has previously been unavailable. Gila River's intention to reach 600 new subscribers on the Gila River Indian Reservation in the next five years promotes this Commission's furthering of the statutory mandate of universal service. Although Gila River's inception of service will place some demands on the Universal Service Fund, the public interest considerations and the fact that Gila River customers will bear a substantial share of the burden in the form of higher local rates, balance this increase in high cost payments. It is clear that the newly-formed and certified Gila River entity is not a spin-off of US West, nor a creation designed specifically to capture Universal Service Funds, but a legitimate telephone company proposing legitimate and desirable service expansion. Based on this information, we believe that the

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[5] US West states in its December 13, 1991, letter that the revenue requirement associated with the Sacaton exchange would be about $240,000.

[6] US West and Gila River filed additional information concerning this acquisition in their joint letters of June 6 and August 8, 1991, in response to questions raised by the Accounting and Audits Division in its letter of May 3, 1991. Gila River states that its current service base of 562 will be expanded by the addition of some 700 customers now served from other US West exchanges. In addition, Gila River expects to add some 624 new (currently unserved) customers over the next five years, raising its current base from 1262 to 1886 or more. *See* letter from David A. Irwin, Attorney for Gila River Telecommunications, Inc. to Kenneth P. Moran, Chief, Accounting and Audits Division, August 8, 1991.

[7] Gila River states that there are 1,262 customers on the Indian Reservation being served by the eight US West exchanges (including Sacaton). These customers will be served by Gila River as part of this acquisition from US West, but no study area boundary waiver is involved.

[8] *Joint Board Order* at 48338, paras. 64-66.

[9] US West and Gila River filed a copy of the approval of the sale by the Arizona Corporation Commission and a copy of the Certificate of Convenience and Necessity issued by the Gila River Indian Community Tribal Council in its June 6, 1991 submission.

[10] *See* letter from Gila River to US West, March 29, 1989.

joint petitioners have adequately justified establishment of a new study area, and have demonstrated how this new study area will encourage expansion of telephone service to unserved territories. Accordingly, we waive the definition of "study area" set forth in Part 36, Appendix-Glossary, of the Commission's Rules so that US West may modify its existing study area and Gila River may establish one new study area for the Sacaton exchange.

12. The parties set forth an acquisition that creates the need for a waiver of the study area boundaries frozen at 1984 definitions. The arrangement described here will result in an overall increase in USF requirement, an occurrence the Commission stated that it wishes to avoid. However, other considerations are also considered. In this case, it is clear that the transfer of the Sacaton exchange is not undertaken for the purpose of garnering more high cost support; the local authorities have given approval; and the parties have made a strong public interest showing. Accordingly, we find good cause to grant the requested study area definition waiver.

C. Section 36.154 and Section 36.125 Waivers

13. In the Joint Petition, Gila River and US West requested a waiver of Sections 36.154 and 36.125, relating to the development of allocation factors.[11] Since these factors are developed according to these rules, Gila River, as a new carrier, requires a waiver of these rules to allow it to establish factors.[12] US West states that the effect on its SPF and COE - Category 3 is *de minimis*.[13] In view of these arrangements, which we find acceptable, we grant petitioners' waiver request.

II. GILA RIVER PETITION

A. Introduction and Background

14. On August 7, 1991, Gila River filed a petition for a "declaration of inapplicability" of the Commission's Rules governing the acquisition of price cap companies by non-price cap companies, or alternatively, for waiver of those rules. Gila River's petition was placed on Public Notice, DA 91-1062, on August 22, 1991. Comments in support of Gila River's petition were received on September 9, 1991, from the United States Telephone Association (USTA), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), the National Exchange Carrier Association (NECA), and the National Telephone Cooperative Association (NTCA). No oppositions or reply comments were filed.

15. Section 61.41 of the Commission's Rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[14] Under this rule, Gila River's acquisition of the US West exchange obligates it to exit the NECA pools and become subject to price cap regulation. Gila River requests waiver of this rule because the rule's application here would be contrary to the public interest.[15] Gila River notes that it has begun a construction program to provide fully digital exchange service to all of its customers, and that it will be providing service to approximately 600 new customers who have never had telephone service before. Gila River Petition at 4-5. Gila River contends that application of the rule would thwart its infrastructure development and the provision of service to new customers. *Id.* at 5.

B. Issue Analysis

16. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[16] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift its costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level. *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706 (cites omitted). The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of 'gaming the system.' Such cases might justify narrow waiver of the all-or-nothing rule." *Id.* at note 207.

17. There is good cause to grant Gila River a waiver of the all-or-nothing rule. The first concern cited by the Commission -- cost-shifting between affiliates -- is not at

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[11] Section 36.154(e)(1) and (2), 47 C.F.R. §§36.154(e)(1) and (2), relating to the computation of the Subscriber Plant Factor (SPF), and Section 36.125(f), 47 C.F.R. §36.125(f), relating to the computation of the composite interstate factor used in the separation of Local Switching Equipment - Category 3 (COE - Category 3) investment for the transitional period.

[12] Gila River, as a new carrier, has no historical SPF, but proposes to use US West's factor. Gila River also states that the B Component of the COE Category 3 factor was developed using 1990 relative dial equipment minutes of use (DEM) exclusively for the Sacaton exchange.

[13] US West also proposes to exclude the DEM for Sacaton from its apportionment procedures for its revised study area.

[14] 47 C.F.R. Section 61.41(c)(2). Section 69.3(e)(11) states that "any changes in Association common line tariff participation and Long Term and Transitional Support resulting from the merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following consummation of the merger or acquisition transaction...."

[15] Gila River contends that the price cap rules are inapplicable because they were adopted after Gila River ratified its acquisition contract with US West. Gila River Petition at 6. We reject this interpretation, as the rules were effective before the acquisition is final.

[16] Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *petitions for further recon. pending, appeal docketed sub nom. D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

issue here. Neither Gila River nor US West is seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rule -- allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" -- is also not raised on the facts of this case. Except for the exchange it has sold to Gila River, US West remains regulated under price caps; it retains no ability to bring this single exchange back under price caps.

18. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[17] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed based largely on the historical performance of the largest local exchange carriers. The Commission therefore made price cap regulation optional for carriers below the largest eight. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Companies, our application of the all-or-nothing rule must take into account the companies' preference, particularly for small carriers.

19. We therefore grant a waiver of the all-or-nothing rule. For the present, Gila River will be regulated under rate of return. Gila River also requests waiver of Section 69.3, to allow it to remain a participant in the NECA pools. Because we are waiving Section 61.41, allowing Gila River to remain under rate of return regulation, Gila River need not withdraw from the NECA pools, and Section 69.3 is not triggered, so no waiver is necessary. As with any other rate of return carrier, Gila River will be free to elect price cap regulation in future, provided it withdraws from the NECA pools.

III. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the Joint Petition of US West Communications and Gila River Telecommunications, Inc. of Part 36, Appendix-Glossary, of the Commission's Rules IS GRANTED to the extent set forth above.

21. IT IS FURTHER ORDERED that the Petition of Gila River Telecommunications, Inc., for waiver of Section 61.41(c)(2) of the Commission's Rules, 47 C.F.R. Section 61.41(c)(2), IS GRANTED.

22. IT IS FURTHER ORDERED that the Petition of Gila River Telecommunications, Inc., for waiver of Section 69.3(e)(11) of the Commission's Rules, 47 C.F.R. Section 69.3(e)(11), IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[17] *See, e.g.*, Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988) (*Small Company Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies Tariff F.C.C. No. — Transmittal Nos. 492 and 501

ORDER

Adopted: March 18, 1992; Released: March 18, 1992

By the Chief, Common Carrier Bureau:

1. In Transmittal No. 492, as modified by Transmittal No. 501, Bell Atlantic seeks to flow through to its ratepayers the effect of an increase in the Public Utility Realty tax (PURTA) passed by the Pennsylvania General Assembly on August 4, 1991.[1] Bell Atlantic treats the additional costs resulting from the tax increase as exogenous costs within the price cap guidelines.[2] Transmittal 492 Description and Justification (D&J) at 13. The Pennsylvania legislature made the tax retroactive to January 1, 1991 and, therefore, the tax affects two separate tariff periods -- January 1, 1991 through June 30, 1991, and July 1, 1991 through June 30, 1992. *Id.* Bell Atlantic states that its overall rates will increase by approximately 0.31 percent and that the filing is below price cap ceilings and within price band limits. D&J at 6-1; 1-5; 2-2.

2. MCI Telecommunications Company (MCI) filed a petition to reject, or alternatively, suspend and investigate Transmittal 492 arguing that, as in the case of Transmittal 473, Bell Atlantic failed to meet the burden of demonstrating that the PURTA tax increase should be accorded exogenous treatment under the price cap rules. Specifically, MCI contends, Bell Atlantic again failed to show that the PURTA increase is not already accounted for in the GNP-PI. MCI Petition at 2, 5. MCI further contends that Bell Atlantic may not rely upon the *Transmittal 473 Order* as justification for not meeting its "GNP-PI burden." MCI asserts that notwithstanding the statement in the Order that "exogenous treatment of utility taxes is consistent with the overall goal of price cap regulation," the Commission still requires local exchange carriers (LECs) to meet the burden of demonstrating that the tax change is not reflected in the GNP-PI. *Id.* at 3-4. MCI therefore argues that Transmittal 492 should be rejected. *Id.* at 5.

3. US Sprint Communications Company Limited Partnership (Sprint) also filed a petition to reject, or alternatively, suspend and investigate Transmittal 492, arguing, as it did against Transmittal 473, that by increasing its rates to reflect the retroactive impact of the tax law change, Bell Atlantic is engaged in retroactive ratemaking. Sprint Petition at 2. Specifically, Sprint contends, Bell Atlantic designed Transmittal 492 to recover costs incurred in past periods through future rate increases in contravention of the principle against retroactive ratemaking enunciated in *Nader v. FCC*.[3] Therefore, Sprint argues, Transmittal 492 should be rejected or alternatively suspended and made subject to investigation. *Id.* at 2, 4-5.

4. In response to MCI's claim that Bell Atlantic's request for exogenous treatment is unsubstantiated, Bell Atlantic states that in the *Transmittal 473 Order* the Bureau found that utility specific taxes like PURTA are not large enough to have an impact on the GNP-PI. Therefore, Bell Atlantic states, no further showing by Bell Atlantic is necessary. Bell Atlantic Reply at 2. In response to Sprint's argument, Bell Atlantic states that the retroactive ratemaking doctrine does not apply to the instant facts because Bell Atlantic is not attempting to recover losses that predate its tariff filing. *Id.* at 3. Bell Atlantic asserts that PURTA was passed by the Pennsylvania legislature in August 1991, and that the first tax payments were due in November 1991. Thus, Bell Atlantic maintains, the increased expenses were incurred contemporaneously with Bell Atlantic's original tariff filing to recover them.[4] *Id.*

5. The Common Carrier Bureau has reviewed Bell Atlantic Transmittal No. 492, as modified by Transmittal No. 501, and the associated pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petitions to reject, or alternatively, suspend and investigate Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 492, filed by MCI Telecommunications Corporation and US Sprint Communications Company, Limited Partnership, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] In Transmittal No. 501 Bell Atlantic revised its cost data to reflect the shorter recovery period required by the effective date of Transmittal 492 being deferred from March 3, 1992 to March 19, 1992.

[2] Bell Atlantic had earlier filed Transmittal No. 473, in which it tried to show that certain tax changes, including PURTA changes, were exogenous costs within price cap guidelines and were not double counted in the Gross National Product Price Index (GNP-PI). While the Common Carrier Bureau rejected Transmittal 473, the Bureau noted that the PURTA increase was eligible for exogenous treatment. We determined, however, that Bell Atlantic had failed to justify the rate increase it had proposed. *See* Bell Atlantic Telephone Companies, Transmittal No. 473, DA 92-175, rel. Feb. 10, 1992 (*Transmittal 473 Order*), at paras. 12, 15.

[3] 520 F.2d 182, 202 (D.C. Cir. 1975).

[4] Bell Atlantic's original tariff filing, Transmittal 473, was filed November 14, 1991, with a scheduled effective date of January 1, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-124

In the Matter of

Virgin Islands Telephone Corporation — Transmittal No. 6

Tariff F.C.C. No. 1

Switched and Special Access Rate Adjustments

ORDER

Adopted: March 19, 1992; Released: March 19, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. In an Order adopted November 5, 1991, the Commission found that the traffic sensitive switched access and special access rates charged by the Virgin Islands Telephone Company (Vitelco) between January 2, 1990 and June 30, 1990 were unlawful to the extent those rates exceeded rates in effect prior to January 2, 1990. The Commission therefore ordered Vitelco to issue refunds with interest within 60 days of the release of the *December 16 Order*.[1] The Commission also directed Vitelco to file a report describing Vitelco's efforts to effectuate these refunds within 30 days of the release of that Order.

2. On January 3, 1992, Vitelco filed a motion to stay the reporting and the refund requirements imposed by the Commission in the *December 16 Order*. Vitelco sought the stay pending reconsideration of the refund by the Commission or judicial review. The Common Carrier Bureau extended the deadline for the refund and the reporting requirements to March 27, 1992.[2] In this Order, we again extend that deadline in order to provide further time to consider Vitelco's stay request and other related pleadings.[3] In so doing, we are relying on the equitable discretion given the Commission under Section 705 of the Administrative Procedure Act, 5 U.S.C. § 705, and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i).

3. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 4(i), that the deadline for the Virgin Islands Telephone Company to file a refund report with the Commission and to effectuate the refunds ordered in the above-captioned docket, IS EXTENDED until April 24, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

[1] Virgin Islands Telephone Corporation, CC Docket No. 90-124, Memorandum Opinion and Order, 6 FCC Rcd 7350 (1991) (*December 16 Order*).

[2] *See* Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 1444 (Com.Car.Bur. 1992); *see also* Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 711 (Com.Car.Bur. 1992) (previously extending the deadline to February 14, 1992).

[3] On January 10, AT&T filed an opposition to Vitelco's motion for stay. On January 16, Vitelco filed a motion to accept its late-filed reconsideration petition. AT&T filed its opposition to Vitelco's motion on January 23; Vitelco filed its reply on January 31, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-373

In the Matter of

Pilgrim Telephone, Inc.

ORDER
(Proceeding Terminated)

Adopted: March 19, 1992; Released: March 19, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On December 23, 1991, we issued an order in the captioned proceeding directing Pilgrim Telephone, Inc. (Pilgrim) to demonstrate that its rates are just and reasonable, or reduce its rates to a just and reasonable level, and to announce, at the beginning of each call that it handles, that its rates are available on request.[1] We issued this order pursuant to our authority to review the rates of interstate providers of operator services (OSPs) under the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).[2]

2. On January 28, 1992, Pilgrim filed a pleading requesting that we terminate the captioned proceeding.[3] Pilgrim argues that it is not an OSP and thus is not subject to our jurisdiction under TOCSIA. Pilgrim states that it is an interexchange carrier providing interstate telecommunications services to the public. According to Pilgrim, Pilgrim carries no traffic from aggregator locations but provides service only to customers that "specifically contract with Pilgrim to carry their telephone traffic at specifically disclosed and agreed rates." Pilgrim Petition at 4.

3. Moreover, in a supplementary pleading that Pilgrim filed March 4, 1992, Pilgrim adds that operator service calls that Pilgrim handles can only be made by end users and that these services are not provided from the public locations that are the focus of TOCSIA. Supplemental Response to Show Cause Order at 3. Pilgrim further states that it does not enter into service agreements with aggregators for the provision of operator services. Moreover, Pilgrim does not knowingly accept operator services traffic from telephones that are made available to the public or to transient users and does not accept requests for presubscription of such phones. Finally, Pilgrim states that it takes real time automatic number identification where available and that in these instances Pilgrim's switch automatically disconnects calls from telephones that are made available to the public or to transient users. *Id.* at 3-4. Pilgrim concludes that it is not an OSP because it does not provide operator service as that term is defined by TOCSIA.[4] Pilgrim therefore requests that we find that it is not an OSP, terminate this proceeding, and allow it to withdraw its informational tariff and monitoring reports. Pilgrim Petition at 5-6.

4. We conclude that, under the facts as set forth in Pilgrim's petition and supplemental pleading, Pilgrim does not appear to have been providing interstate operator services at any time relevant to this proceeding. Pilgrim states that it does not provide service initiated from an aggregator location because "Pilgrim's operator services calls may be made only by endusers specifically choosing to place their calls over the Pilgrim network by means of a special dialing pattern, dedicated access from private locations, or by means of pre-subscription of private telephones. Pilgrim does not provide pre-subscribed operator service to public phones, hotels, motels, hospitals or any other public locations." *Id.* at 4. Moreover, Pilgrim emphasizes that it does not accept requests for presubscription of telephones that are made available to transient users. Supplemental Response at 3-4. We therefore conclude that Pilgrim is not an OSP and that this proceeding should be terminated.[5]

5. Accordingly, IT IS ORDERED, that the Petition for Reconsideration and Termination of Proceeding and Motion for Expedited Review filed by Pilgrim Telephone, Inc., IS GRANTED to the extent indicated herein and otherwise IS DENIED.

6. IT IS FURTHER ORDERED that the captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

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[1] Pilgrim Telephone, Inc., CC Docket No. 91-373, DA 91-1608, released Dec. 23, 1991 (Com.Car.Bur.) (*Rate Review Order*).

[2] TOCSIA is codified as Section 226 of the Communications Act, 47 U.S.C. § 226.

[3] Pilgrim captions its pleading as a Petition for Reconsideration and Termination of Proceeding and Motion for Expedited Review. *See* note 5, *infra*. The *Rate Review Order* required Pilgrim to file its rate justification not later than February 6, 1992 and to begin announcing that its rates are available on request on that date. This deadline subsequently was extended. *See* Pilgrim Telephone, Inc., CC Docket No. 91-373, DA 92-163, released Feb. 6, 1992 (Com.Car.Bur.); Pilgrim Telephone, Inc., CC Docket No. 91-373, DA 91-209, released Feb. 20, 1992 (Com.Car.Bur.); Pilgrim Telephone, Inc., CC Docket No. 91-373, DA 91-274, released Mar. 6, 1992 (Com.Car.Bur.).

[4] TOCSIA states, in relevant part, that "'operator services' means any interstate telecommunications service initiated from an aggregator location..." 47 U.S.C. § 226(a)(7).

[5] Pilgrim's petition, if viewed as a petition for reconsideration of the *Rate Review Order*, is untimely as petitions for reconsideration must be filed "within 30 days from the date of public notice of the final Commission action..." 47 C.F.R. § 1.106(f). Pilgrim's petition was filed on the thirty-sixth day after public notice of the *Rate Review Order*. It is questionable, moreover, whether a petition for reconsideration would lie in any event as the *Rate Review Order* is an interlocutory order and thus not "final." Nevertheless, termination of this proceeding is clearly appropriate under Sections 4(i) and 4(j) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Communications Satellite Corporation — Transmittal No. 925

Revisions to Tariff F.C.C. No. 103

ORDER

Adopted: March 19, 1992; Released: March 20, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On January 22, 1992, Communications Satellite Corporation (Comsat) filed Transmittal 925 to provide full time, Steerable Spot Beam (SSB) video service through the inclined orbit satellite at 338.5 degrees E. L. in the Atlantic Ocean Region. The spot beam enables a customer to access the satellite from earth stations in narrow coverage areas, and thus allows the customer to make use of transportable earth stations. Whereas existing spot beam services on this satellite require that the customer-designated beam position be maintained for the entire lease term, SSB will allow the customer to repoint the beam repeatedly throughout the two-year period of its lease term. Comsat states that this will facilitate news gathering from a large geographical area which includes Africa and Western Europe, without the need for multiple leases. Tr. 925 Description and Justification at Part A. Comsat will assess for SSB service the existing monthly rate for two-year leases of spot beam service. *Id.* at Part C.

2. Cable News Network, Inc. (CNN) has filed a petition to reject or to suspend and investigate Transmittal 925. First, CNN argues that Comsat's rate for SSB is not cost-based because it consists of the substantially lower monthly rate associated with a two-year lease of spot beam service, rather than the much higher monthly rates of various shorter-term leases. CNN claims that Comsat knows that the anticipated launch of the new Intelsat K satellite will likely result in discontinuance of these steerable beam leases within a few months.[1] CNN Petition at 1-2. Second, CNN maintains that Comsat has prematurely implemented the new service by announcing it through a telex of January 27, 1992, whereas the formal tariff revision itself is not scheduled until May 2, 1992. *Id.* at 2. Third, CNN charges that SSB is discriminatory in relation to other spot beam services on this satellite because Comsat would waive penalties for premature termination of the two-year spot beam lease if it is displaced by the new Intelsat K satellite, while not waiving similar penalties for other services that might also be displaced in this way. *Id.* Finally, CNN argues that Comsat's intermingling of full time and occasional service on the same repointable beam and associated transponders will in effect preclude the valuable contribution of such occasional use service. *Id.* at 2-3.

3. Comsat first replies that, technologically, steerable spot beam service can continue to a significant extent even after the K satellite is launched, thereby justifying the use of two-year lease rates. Comsat Reply at 2. Moreover, Comsat asserts that even if the K satellite forces discontinuance of steerable beam service, there would be no discrimination in waiver of penalties because comparable waivers would be granted for any other services terminated in this way.[2] In addition, Comsat claims, by the time the K satellite is operational, there in fact will not be any such similarly terminated services. *Id.* at 2-3. Comsat further argues that the spot beam has never been earmarked solely for occasional use, and most customers who have recently subscribed to spot beam service have done so on a full time usage basis. According to Comsat, the main feature which distinguishes Transmittal 925 is that the spot beam may be repositioned during the course of the lease. Comsat notes that CNN is just as eligible for this useful feature as any other potential customer, and that the public interest will be served by utilizing it. *Id.* at 4-6.

4. The Common Carrier Bureau has reviewed Comsat's Transmittal 925 and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Communications Satellite Corporation Tariff F.C.C. No. 103, Transmittal 925 filed by Cable News Network, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

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[1] Intelsat plans to launch another satellite, on the Ku-band, in the same location as the inclined-orbit satellite at issue here. That satellite is projected to become commercial in August 1992. It is possible that the spot beam, which is also on the Ku-band, will interfere with the new Intelsat K satellite, and that the former will therefore be discontinued at that time. Transmittal 925 provides that if this occurs, premature termination liability will be waived for SSB customers. Transmittal No. 925, dated Jan. 22, 1992, Sec. 7.7. 2 at 2nd Revised Page 81.05.

[2] On March 16, 1992, Comsat filed revisions to clarify that the conditions under which a customer for SSB service would be released from its service lease without an early termination charge would also be applicable to all other spot beam customers on the existing satellite, including longterm, short-term, and occasional-use customers. Transmittal No. 940, dated Mar. 16, 1992, Section 7.7. 2 at 3rd Revised Page 81.05.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-24

In the Matter of

Local Exchange Carrier Line
Information Database

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: March 19, 1992; Released: March 20, 1992

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order designates for investigation issues arising from several local exchange carriers' (LECs') offerings of line information database service, that were previously set for investigation by the Common Carrier Bureau (Bureau) in the *LEC LIDB Order*[1] and the *SNET LIDB Order*.[2] The affected carriers, Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), GTE Telephone Operating Companies (GTE), NYNEX Telephone Companies (NYNEX), Pacific Bell Telephone Companies (Pacific Bell), Southern New England Telephone Company (SNET), Southwestern Bell Telephone Company (SWB), United Telephone System (United), and US West, Inc. (US West) filed tariffs to establish charges for transmission services connecting customers to the carriers' common channel signalling networks (CCS) and for access to the data in their line information databases (LIDB).[3] In the *LEC LIDB Order* and the *SNET LIDB Order*, we suspended the subject transmittals for one day, imposed accounting orders, and initiated investigations of the tariffs referenced above.

II. ISSUES DESIGNATED FOR INVESTIGATION

2. The following issues are designated for investigation:

A. Have the LECs adequately described the LIDB query service in the tariffs?

Petitioners allege that the tariffs lack sufficient detail for potential customers to be certain of what service they are receiving. Parties have argued that the LECs should provide the following information in their tariffs: the frequency, nature, and priority of database updates, and the LEC liability for erroneous information in the database; to the extent that carriers reference technical publications, the dates of the latest revisions to any referenced technical publication should be reflected in the tariff; liability for fraudulent use of calling cards; "call gapping" procedures;[4] and additional technical parameters for processing database queries. To aid in the investigation of this issue, we invite interested parties to address whether the tariffs should contain such information.

B. Should the tariffs contain additional detail regarding the technical parameters for the CCS interconnection link?

In order to access LIDB, customers must purchase a CCS interconnection link. The tariff descriptions of the CCS interconnection service contain cross references to technical publications and state that the CCS interconnection link is technologically equivalent to a 56 kbps special access line. In their special access tariffs, carriers specify a number of technical parameters for a 56 kbps line. Parties should address whether tariffs for CCS interconnection links should include a similar level of detail regarding technical parameters.

C. Are the rate levels established in the tariffs excessive?

To assist in our resolution of this rate level issue, we direct the carriers specified below to provide the following information:

(1) Bell Communications Research, Inc., has developed a cost model called "Common Channel Signalling Cost Information System" (CCSCIS). Any carrier who relied on CCSCIS to develop its rates must explain why use of such a model is appropriate for common channel signalling services.

(2) Those carriers who did not use CCSCIS to allocate investment should fully explain how they identified the plant used to provide LIDB service.

(3) All filing carriers should provide total investment underlying each of the four rate elements and identify the accounts established by Part 32 of the Commission's Rules, 47 C.F.R. Part 32, in which these investments are recorded.

(4) All filing carriers should identify and fully document all factors applied to the investment identified in response to the requests for information above to develop the rates, cross-referencing to Automated Reporting Management Information System (ARMIS) data where possible.

(5) Bell Atlantic, BellSouth, NYNEX, and Pacific Bell were providing CCS interconnection service under tariff before the filing of the transmittals under investigation in this docket. Those carriers should demonstrate how their CCS interconnection service rates meet the requirements for restructured services in Part 61.49(f) of the Commission's Rules.

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[1] Local Exchange Carrier Line Information Database, 7 FCC Rcd 525 (Com.Car.Bur. 1991) (*LEC LIDB Order*).

[2] Southern New England Telephone Company, Transmittal Nos. 531 and 533, 7 FCC Rcd 1474 (Com.Car.Bur. 1992) (*SNET LIDB Order*).

[3] Unless otherwise indicated, the acronym "LIDB" is an abbreviation for line information database (or data base).

[4] "Call gapping" is a procedure that is invoked when the database is receiving more traffic than it is equipped to process. When the traffic volume exceeds the capacity of the database, the originators of the traffic are instructed by the database to reduce the number of queries being sent to the LIDB. Consequently, when an overload condition exists, call gapping will cause a delay in the processing of a portion of the LIDB queries.

III. PROCEDURAL MATTERS

A. Filing Schedules

3. This investigation will be conducted as a notice and comment proceeding. CC Docket No. 92-24 has been assigned for this purpose. Ameritech, Bell Atlantic, BellSouth, GTE, NYNEX, Pacific Bell, SNET, Southwestern Bell, United, and US West are designated as parties. These parties shall file their direct cases no later than April 21, 1992. The direct cases must present the parties' positions with respect to the issues described in this Order. Pleadings responding to the direct cases may be filed no later than May 21, 1992, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." The parties may each file a "Rebuttal" to oppositions or comments no later than June 1, 1992.

4. An original and seven copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy of each pleading must be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments must specify the docket number of this investigation.

5. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

B. *Ex Parte Requirements*

6. *Ex parte* contacts (*i.e.*, written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

C. Paperwork Reduction Act

7. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

IV. ORDERING CLAUSES

8. IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205, and 403, that the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

9. IT IS FURTHER ORDERED that each carrier SHALL INCLUDE a response to each item of information requested in Section II, *supra*, in its direct case.

10. IT IS FURTHER ORDERED that Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, GTE Telephone Operating Companies, NYNEX Telephone Companies, Pacific Bell Telephone Companies, Southern New England Telephone Company, Southwestern Bell Telephone Company, United Telephone System, and US West, Inc., SHALL BE parties to this proceeding.

11. IT IS FURTHER ORDERED that this Order IS EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New York Telephone Company

Petition for Waiver of Commission's
Rules Regarding Selection of Primary
Interexchange Carriers

ORDER

Adopted: March 20, 1992; Released: March 23, 1992

By the Deputy Chief, Common Carrier Bureau:

1. On January 21, 1992 the New York Telephone Company (NYT) filed a petition for waiver of the Commission's rules regarding selection of primary interexchange carriers (PIC).[1] NYT requests the waiver to permit NYT to engage in modified procedures for notifying customers in 36 end offices being converted from an alternative equal access technology to full equal access technology. This request would make the reballoting process unnecessary for NYT's customers who have already selected a PIC where NYT now provides alternative equal access.[2]

2. On April 7, 1988, the Bureau granted NYT a waiver of the Commission's Rules to provide alternative equal access service to the 36 aforementioned end offices, subject to the requirement that NYT reballot affected customers when full equal access is provided.[3] NYT reports that it will be converting its end offices to full equal access beginning in the fourth quarter of 1992 and continuing through 1994. NYT Petition at 1.

3. NYT states that once the end offices are converted to full equal access, 10XXX dialing will be available, and that it would notify end users in these offices by direct mail of the additional calling capabilities. *Id.* at 2. NYT maintains that to reballot end users who have already chosen a PIC is likely to cause customer confusion and market disruption, and will cause NYT to incur undue additional costs. *Id.*

4. NYT proposes to offer end users the opportunity to make a one-time change in their PIC without charge, for 30 days after cutover of the end offices to equal access. It argues that the public interest would be better served by implementing this proposal, rather than to proceed with reballoting.

5. The Common Carrier Bureau has reviewed the petition filed by New York Telephone Company, and we have concluded that a grant of the waiver will avoid customer confusion and that consumer interests will be adequately protected by NYT's notification to its customers that they have a right to change IXCs without charge for a limited period of time. We therefore conclude that the public interest would be served by a grant of NYT's waiver petition.

6. Accordingly, IT IS ORDERED that the petition for waiver filed by the New York Telephone Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[1] No comments were filed in response to the petition.

[2] The alternative equal access methods allow customers to select a PIC for 1+ interLATA dialing, but do not allow 10XXX dialing.

[3] *See* New York Telephone Company and New England Telephone and Telegraph Company, Transmittal Nos. 875 and 901, Order, 3 FCC Rcd 2311, 2312 (Com.Car.Bur. 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York — Reference No: DA 91-145

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1992; Released: March 31, 1992

By the Commission:

I. INTRODUCTION

1. Petitioner, Joseph A. Carino, requests the Commission to issue a declaratory ruling preempting the satellite dish zoning ordinance of the Town of Deerfield, New York (Deerfield). Mr. Carino's Petition is supported by several commenters[1] and opposed by Deerfield.[2]

2. Mr. Carino bases his request for preemption on the Commission's rule, Section 25.104,[3] which preempts local regulations that differentiate between satellite earth stations and other antennas and that do not have a reasonable, clearly defined health, safety or aesthetic objective, and impose unreasonable limitations or excessive costs on reception of satellite signals. The Commission's order adopting this rule[4] indicates that it is based on the concern that excessive local regulation would unduly interfere with the federally guaranteed right of earth station antenna users to receive certain satellite signals for private home viewing.[5] However, the *Order* also states that the Commission does not intend to become a national zoning board[6] and that individuals requesting Commission review will be expected to show that other available remedies have been exhausted.[7]

II. MR. CARINO'S CASE

3. Mr. Carino provides the following details about his efforts to obtain Deerfield's permission to install a satellite dish at his home.[8] Mr. Carino is a resident of Deerfield, New York and lives on a lot less than one-half acre in size. The zoning code of Deerfield prohibits the installation of "dish" antennas and any "tower-type" antennas weighing more than one hundred pounds on any lot less than one-half acre in size.[9] Despite this prohibition, Mr. Carino installed a ten foot satellite receiving antenna in his back yard. In February 1987, Deerfield issued an "Appearance Ticket" for violation of the zoning code; Mr. Carino appeared in criminal court, posted $100 bail and advised the court that he wished to apply for a variance to the ordinance. In March 1987, he applied to the Zoning Board of Appeals for a variance, paid a $50 application fee and brought a petition signed by most of his neighbors endorsing the installation of his earth station. None of his neighbors opposed the antenna. Mr. Carino's application for a variance was denied by the Board for failure to show a "hardship" sufficient to justify the issuance of a variance.

4. After this denial, Mr. Carino filed an action in the New York state trial level court (Supreme Court) for review of the Board's decision. This action was taken pursuant to a procedure typically used to review zoning board decisions in the state of New York.[10] The Supreme Court ruled that the ordinance was valid.[11] The court based its opinion on the fact that the ordinance applied to both dish antennas and tower antennas[12] and thus, in the court's opinion, it did not differentiate or discriminate against satellite earth stations.

5. Mr. Carino appealed to the Appellate Division and to the Court of Appeals of the State of New York. Both courts ruled against him.[13] After the rejection of his appeals in state courts, Mr. Carino's criminal case was reactivated, he was fined $100, and he was advised that his antenna would be removed in March, 1989. The appeal of this conviction is pending.

6. On December 15, 1988, Mr. Carino filed an action in the United States District Court requesting a declaration that the Deerfield ordinance is preempted by Section 25.104. In an opinion dated November 23, 1990, the District Court dismissed Mr. Carino's case, stating that he was barred by the doctrine of collateral estoppel from relitigating in that court the issues decided by the state courts, including the issue of whether or "not the ordi-

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[1] Commenters supporting preemption include American Satellite Television Alliance (ASTA), National Association of Broadcasters (NAB), Satellite Broadcasting and Communications Association (SBCA), and United States Satellite Broadcasting Company, Inc. (USSB). Reply comments were filed by NAB and Video Services Corporation/Atlantic Satellite Communications, Inc. (VSC). Both petitioners and the Town of Deerfield requested authority to file late comments which has been granted for good cause shown.

[2] Although the pleading filed by Deerfield is captioned as an "Answer," in substance it is an opposition to Mr. Carino's Petition and we will consider it such.

[3] 47 C.F.R. § 25.104.

[4] Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, (*Order*), 59 RR 2d 1073, 51 Fed. Reg. 5519 (1986), Reconsideration, 2 FCC Rcd 202 (1987).

[5] *See Order* at para. 26, citing 47 U.S.C. § 605.

[6] *Order* at para. 39.

[7] *Order* at para. 40.

[8] Deerfield does not dispute these facts.

[9] Deerfield's zoning ordinance is set forth in full in Appendix A.

[10] This proceeding is referred to as an Article 78 proceeding.

[11] Carino v. Pilon, R.J.I. #32-87-609 (July 27, 1989).

[12] The court's opinion does not mention that the ordinance's lot size restriction applies only to antenna towers weighing over 100 pounds.

[13] The New York State Appellate Division stated that an Article 78 proceeding is not the proper procedure to challenge the constitutionality of a zoning ordinance. Neither of these appellate courts discussed the merits of Mr. Carino's case.

nance was preempted by our rule.[14] The U.S. Court of Appeals for the Second Circuit recently affirmed this decision.[15]

7. Mr. Carino states that the criminal action against him was not enforced during the pendency of his civil litigation but that he now expects that his satellite antenna will be removed at any time. He also states that he has spent over $14,000 in an unsuccessful attempt to install an antenna which cost $1500.

III. DISCUSSION

8. We find that the zoning ordinance of the Town of Deerfield, New York is preempted by 47 CFR § 25.104. That rule states in relevant part:

> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations;
>
> a) have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> b) do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

Deerfield's ordinance fails to meet the threshold requirement that it not differentiate between types of antenna facilities. In addition, the ordinance fails to comply with both parts (a) and (b) of our test for preemption.[16]

A. Differentiation

9. Initially, a community seeking to regulate satellite earth stations must determine if its ordinance will apply to all antenna facilities equally or if it will single out satellite facilities for different treatment. The Deerfield ordinance singles out two types of antennas, all satellite dish antennas and any tower type antenna weighing over one hundred pounds, and restricts these to lots at least one-half acre in size. The ordinance does not restrict lot sizes for other types of antennas such as some types of terrestrial microwave antennas, over-the-air broadcast television antennas, or tower antennas weighing less than one hundred pounds. Accordingly, we conclude that the ordinance does "differentiate" between satellite receive-only antennas and other antennas under 47 C.F.R. § 25.104. Both Deerfield and the Supreme Court of New York have taken the position that because the ordinance applies to two types of facilities and not just to satellite dishes, the regulation is exempt from preemption and does not need to be analyzed under the second part of our rule. This conclusion is incorrect.

10. The *Order* which adopted our present rule supports our interpretation here that Deerfield's ordinance differentiates between satellite receive-only and certain other antennas. As we stated there:

> Non-federal regulations may impose, under our adopted rule, reasonable requirements on all antennas as long as these local standards are uniformly applied and do not single out satellite receive-only facilities for different treatment. (footnote omitted) An ordinance attempting to regulate all antennas by enacting restrictions on those of a certain shape, for example a ban on all spherical antennas, would differentiate between satellite antennas and other types of facilities and therefore would be preempted under our rule. Communities wishing to preserve their historic character may limit the construction of 'modern accoutrements' provided that such limitations affect all fixed external antennas in the same manner. (footnote omitted)[17]

11. Thus, in order to meet the threshold criterion of our rule, a local regulation must affect *"all fixed external antennas in the same manner"* (emphasis added).[18] Deerfield's ordinance fails this test because certain tower antennas as well as other types of antennas can escape the ordinance's restrictions while all dish antennas are affected.

12. Deerfield argues that its ordinance does not single out satellite facilities for different treatment because it "applies in a fair and even handed manner to all antennae that have a similar impact on the environment".[19] We reject this argument. There is no indication in our rule or the accompanying *Order* that a differentiation requirement can be so justified and thereby avoid preemption without the necessity of meeting parts (a) and (b) of our rule. The rule is clear on its face. If, for any reason, the local regulation imposes different requirements on satellite antennas than are imposed on *all* other antenna facilities, further scrutiny is necessary.

13. In addition, the ordinance, on its face, does not say that it applies with equal force to all antennas with a similar environmental impact. Instead, it singles out all "dish" antennas and tower type antennas that weigh over one hundred pounds. No other explanatory background is provided. There is nothing in the regulation that indicates why Deerfield considered these two types of antennas to have a similar environmental impact.[20] Indeed, as noted by a commenter, it is difficult to conclude that one-hundred pound antenna towers and, for example, small

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[14] Carino v. Town of Deerfield, 750 F.Supp. 1156 (N.D.N.Y. 1990).

[15] Carino v. Town of Deerfield, Doc. No. 90-9116, (2d Cir. June 21, 1991).

[16] We also find that Mr. Carino has sufficiently exhausted his other available remedies prior to requesting Commission review.

[17] *Order* at para. 32.

[18] *Id.* There is also a question whether the prohibition on tower antennas is invalid under 47 CFR § 97.15(e), but this issue is not directly presented by the present case. *See also* Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 100 FCC 2d 952 (1985).

[19] Answer of Deerfield at 2. Deerfield also indicates that it would "make no sense" to regulate car radio antennas in the same manner as satellite dishes. However, the *Order* states that all fixed antennas must be treated similarly and car radio antennas are not fixed antennas.

[20] The affidavit accompanying the Town's answer does not clarify this issue even if it could be considered as an after-the-fact justification. *See* discussion *infra*.

dish antennas designed to operate in the KuBand and measuring approximately two or three feet in diameter would have a similar impact on the environment.[21] Deerfield cannot cure an otherwise preemptible ordinance by reading in criteria that are not in the regulation. Similarly, such distinguishing criteria must be based on a rational assessment of the regulated facilities.[22]

B. Reasonable Objective

14. Having found that the Deerfield ordinance does differentiate between satellite receive-only antennas and other types of antenna facilities, we must further determine if the ordinance has a reasonable and clearly defined health, safety or aesthetic objective. The burden is on Deerfield to justify the discriminatory nature of its regulation.[23] The ordinance in question does not appear to be based on any stated objective.[24] Deerfield in its Answer offers an affidavit from the Chairman of the Planning Board. This affidavit states that the Planning Board researched legislation regulating dish and tower antennas. Of particular concern were aesthetics and visual impact in residential neighborhoods. According to the affidavit, the Planning Board did not intend to discriminate against satellite antennas, and the affidavit notes that the legislation does not operate as a ban because a variance procedure is available for antenna users with lots smaller than one-half acre. Based on this, we must therefore determine whether this affidavit, executed in March 1991, five years after the ordinance was enacted, satisfies Section 25.104's requirement that a zoning regulation, in order to avoid preemption, must "have a reasonable and clearly defined" objective. We find that it does not.

15. First, a statement prepared and signed by a person involved in drafting the legislation, after the ordinance was enacted, is insufficient to meet this requirement. We agree with the interpretation given our rule by several courts that the ordinance's objective must be set forth expressly in the state or local regulation. As stated by one court:

> The court agrees with the view that the health, safety or aesthetic objective must be expressly articulated in the ordinance itself or in accompanying regulations. Virtually every ordinance restricting TVRO antenna placement might be said to have an implied aesthetic objective. If such an implied and unclear purpose could satisfy the FCC regulation, the words "clearly defined" would be meaningless.[25]

16. In addition the affidavit does not meet the rule's requirement that an aesthetic objective that justifies different treatment for satellite antennas must be reasonable. The ordinance singles out two types of antennas for regulation based on aesthetic concerns -- satellite dishes and tower antennas weighing more than one hundred pounds. The regulation does not consider the size of the satellite dish and thus even very small antennas are precluded on aesthetic grounds. The affidavit does not address this issue. If the objective of the ordinance is to control aesthetics, it is unreasonable to ignore all aspects of visual impact such as size.[26]

C. Unreasonable Limitations on Reception

17. Lack of a clearly defined and reasonable objective, alone, is sufficient to invalidate Deerfield's ordinance by failing to meet the criteria in part (a) of our rule.[27] In addition, we find that the ordinance fails to meet the second part (b) of our preemption test because it unreasonably restricts -- and in fact, prevents, -- reception of satellite delivered signals by all those living on lots of less than one-half acre. Deerfield attempts to meet this aspect of our rule through its claim that its zoning variance procedure allows relaxation of the lot size requirement and would presumably allow dish antennas on smaller lots. We do not need to reach the general issue of whether or not a well crafted variance procedure can, in some cases, cure a regulation that unreasonably restricts reception.[28] In this case, the record indicates that variances are not readily available to antenna users on smaller lots in Deerfield. Mr. Carino's petition states that his application for a variance was denied because he failed to show a "hardship" sufficient to justify the issuance of a variance. No other information about Deerfield's procedure or what is sufficient to constitute hardship was supplied by either Mr. Carino or Deerfield.[29] The burden is on Deerfield to justify its regulation and absent any other evidence, we can only conclude that a large segment of antenna users living on smaller lots who cannot show an unspecified "hardship" are being denied the right to reasonable reception. Accordingly, Deerfield has failed to show how its variance procedure operates to permit reasonable reception of satellite delivered signals on lots of less than one half acre.

D. Collateral Estoppel

18. Deerfield's final argument against preemption is that Mr. Carino is barred by the doctrine of collateral estoppel from litigating the validity of the zoning ordinance before this Commission. The basis of this argument is that Mr. Carino cannot collaterally attack in court or

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[21] *See* Comments of USSB at 2. We note that antennas of this size could weigh approximately 50 pounds excluding the supporting structure.

[22] This discussion is not intended to imply that even if Deerfield's ordinance did expressly state that it applied to all antennas with a similar environmental impact, it would avoid preemption. Our rule states that local regulation must apply equally to all antennas, regardless of environmental impact.

[23] *Order* at para. 33. *Reconsideration* at para. 21.

[24] *See* Comments of NAB at 2, Comments of USSB at 6, Reply Comments of VSC at 5. A copy of the ordinance was provided as an exhibit to Mr. Carino's petition. Deerfield did not dispute in its Answer that this was a correct and complete copy but instead provided an affidavit containing information not in the ordinance itself.

[25] Cawley v. City of Port Jervis, 753 F.Supp. 128, 132 (D.N.Y. 1990). *See also* Hunter v. City of Whittier, 257 Cal. Rptr. 559 (1989).

[26] *See* Reply Comments of NAB at 2.

[27] *See* Cawley v. City of Port Jervis, *supra* n.22 at 132.

[28] 25 *See* discussion of this issue in Van Meter v. Township of Maplewood, 696 F.Supp. 1024, 1031-32 (D.N.J. 1988).

[29] NAB asserts that the record here fails to demonstrate that Deerfield, in applying the variance procedure, considered the requirements of our rule. NAB Comments at 4.

before administrative agencies the judgment of the New York state trial court, as affirmed on appeal, that the ordinance was not preempted.[30] Deerfield also asserts that its position is supported by the district court's opinion in this case as affirmed by the court of appeals. Finally, Deerfield argues that the Commission, by retaining jurisdiction in this matter, has improperly placed itself in the position of reviewing a decision of a higher court. We reject Deerfield's position on this issue.

19. The two cases [31] cited by Deerfield do not support its contention that Mr. Carino is collaterally estopped from requesting a declaratory ruling on the preemption issue. Neither of these cases involves a question of the application of the doctrine of collateral estoppel. Instead, both state the general proposition that federal agencies are required to follow federal circuit court precedents. There is no federal circuit court decision holding that the Deerfield ordinance is not preempted by the FCC's rule, so these cases are inapposite.

20. In addition, neither the district court nor the court of appeals addressed the issue of whether collateral estoppel would apply to petitions filed by Mr. Carino with the Commission. The district court examined the New York State court litigation and concluded that the requisite elements existed to bar Mr. Carino from bringing his preemption claim before a federal court. This determination was summarily affirmed by the circuit court. There is no discussion in either courts' opinion regarding whether Mr. Carino would be estopped from bringing the Deerfield ordinance to the FCC's attention. Thus, Deerfield's suggestion that the Commission ruling in this case would be contrary to the decision of the Second Circuit is incorrect.

21. Even assuming that some elements of collateral estoppel apply here, it would be unfair to bar Mr. Carino's petition on the basis of that doctrine. As stated by the U.S. Supreme Court, "Collateral estoppel, like the related doctrine of res judicata, (footnote omitted) has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[32] Certain factors must be present in a case before the doctrine will be applied. These include the following: 1) The party to be estopped must have been a party or in privity with a party in the prior action; 2) the issues must be the same issues as in the prior proceeding; 3) the issues must have actually been litigated and necessary to the prior judgment and 4) the application of collateral estoppel must not result in unfairness.[33]

22. NAB argues that the application of collateral estoppel would be unfair in this instance and thus the fourth requirement is not met."[34] It states that it would be "manifestly" unfair for the Commission to refuse to hear antenna users prior to exhaustion of their legal remedies and then bar their petitions on the basis of adverse prior judgments.

23. We agree with NAB. Since the adoption of our preemption rule, we have consistently insisted that individuals exhaust other legal remedies before requesting Commission relief. Thus, it would certainly be unfair for us to use these efforts as a bar against petitioners when they appear before us.

E. Other Matters

24. Many of the commenters supporting Mr. Carino's petition urged us to make various changes in our preemption rule to address specific problems that other antenna users have encountered in their attempts to install satellite antennas in communities across the country. After Mr. Carino's petition was filed and placed on public notice, the Satellite Broadcasting and Communications Association of America (SBCA) filed a Petition for Declaratory Ruling requesting clarification and modification of our rule. Because this later petition is more generally directed to the operation of our rule and makes several suggestions on how it should be modified, we will consider the general comments filed in connection with the instant case when we rule on the SBCA request. In this order, as the petition has requested, we confine our findings to the question of the validity of the ordinance of the Town of Deerfield, New York and the unreasonable restrictions it has placed on the federal right of Joseph Carino to receive satellite delivered signals. [35]

III. CONCLUSION

25. Accordingly, IT IS ORDERED that the satellite antenna zoning ordinance of the Town of Deerfield, New York is preempted by 47 CFR § 25.104.

26. IT IS FURTHER ORDERED that the Petitioner's and the Town of Deerfield's Motions for Late Filing are granted.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[30] Deerfield cites NLRB v. Ashkenazy Property Management Corp., 817 F.2d 74 (9th Cir. 1987) and Spraic v. U.S.R.R. Retirement Board, 735 F.2d 1208 (9th Cir. 1984) to support this proposition.

[31] *Id.*

[32] Parklane Hosiery Co., Inc. v Shore, 439 U.S. 322, 326 (1979). *See also*, discussion of collateral estoppel in Brief of Appellants Joseph Carino, Sr., Sylvia Carino and Joseph A. Carino filed as supplemental comments in this proceeding pursuant to a Motion for Late Filing which we grant in this order.

[33] Glictronix Corp. v. American Telephone and Telegraph Co., 603 F.Supp. 552 (D.N.J. 1984), cited by NAB.

[34] NAB cites several authorities in support of its fairness argument. *See* Otherson v. Department of Justice, I.N.S., 711 F.2d 267 (D.C. Cir. 1983); Nasem v. Brown, 595 F.2d 801 (D.C. Cir. 1979); 18 Wright, Miller & Cooper, Federal Practice and Procedure, § 4423 (1981, 1990 Supplement).

[35] *See* Comments of ASTA at 23-25 for a discussion of the effect of grant of this relief.

APPENDIX A

ZONING ORDINANCE

TOWN OF DEERFIELD ONEIDA COUNTY NEW YORK

THE TOWN PLANNING BOARD

EDWIN L. HARCOURT, Chairman

Bernard Kolwaite
James Nelson
Mary McLaughlin
Robert Powers
Paul Stappenbeck
Fred Wiehenstroer

THE TOWN BOARD

DONALD S. YOULEN, Supervisor

Francis P. Domser
Edward T. Wurz
Arleigh Paquette
Peggy Boshart

VIRGINIA COVEY, Town Clerk

JOSEPH F. RUSKEY, Superintendt - Highways

FCC MAIL BRANCH
JAN 24 1991

Revised April 14, 1986

DEFINITIONS – To be added to Section 3 alphabetically

ANTENNAE, DISH: Consists of three main components – the antennae itself, often called a dish; a low-noise amplifier (LNA); and a receiver. The antennae and LNA are generally located outdoors and are connected by coaxial cable to the receiver, which is usually placed indoors.

ANTENNAE, TOWER TYPE: A structure weighing more than one hundred (100) pounds utilized to transmit and/or receive electromagnetic waves (i.e. radio, television, short-wave signals).

SOLAR ENERGY SYSTEMS:

a) ACTIVE TYPE – a system that requires mechanical power to transfer heat from the collected source to the point of utilization.

b) PASSIVE TYPE – a system that functions without the use of any mechanical power.

WIND ENERGY CONVERSION SYSTEMS: Wind Energy Conversion System – any device – such as a wind charger, wind turbine or windmill – that converts wind power to another form of energy such as electricity or heat.

RECEIVED BY
JAN 24 1991
MAIL BRANCH

Replaces Section 17 – page 30 of the Zoning Ordinance

Section 17 – Accessory Buildings; Dish and Tower Type Antennae; Solar Energy System; Wind Energy Conversion Systems

A. ACCESSORY BUILDINGS:

1. Number: Not more than one accessory building, in addition to any private garage, will be permitted in conjunction with any single principle use, except that this provision shall not apply to a farm.
2. Height and Size: Maximum size of accessory buildings shall be R–2 one hundred eighty (180) square feet maximum, height ten (10) feet maximum. R–1 two hundred ten (210) square feet maximum, no height limitation on barns, silos, and other accessory farm structures. No private garage accessory to a residence shall exceed five hundred eighty (580) square feet. No accessory building to other than a residential use shall exceed fifty (50) percent of the ground floor area of the principal building to which it is accessory, except that this provision shall not apply to accessory farm structures.
3. Location: Accessory buildings which are not attached to a principal building may be erected only in accordance with the following requirements: Side or rear yard – a minimum of ten (10) feet from side or rear property line. Side yard, street side of corner lot – same as for principal building. Movable temporary buildings can be within two (2) feet of the rear lot line.

B. DISH OR TOWER TYPE ANTENNAE:

General Regulations:

a. In R–1 or R–2 District no dish or tower type antennae shall be erected on any lot less than one-half (½) acre.

b. No dish or tower type antennae shall be located in a front yard or corner lot fronting on more than one street.

c. No dish or tower type antennae shall be erected on any lot without the issuance of a building permit by the enforcement officer(s) and subject to the following so as to be cosmetically acceptable for all adjoining landowners:

1. All towers and antennae shall have setbacks from any lot line equal to or greater than the height of the proposed structure, but in any case not less than thirty (30) feet.
2. Only one such structure shall exist at any one time on any lot or parcel.
3. The applicant shall present documentation of the possession of any required federal or state license.
4. The owner of such a structure shall assume complete liability in case of personal or property damage.

d. Dish Type – special regulations:

1. No part twelve (12) feet above ground level.
2. Projected area:

Solid type – 51 square feet
Mesh type – 80 square feet

e. Tower – special regulations:

1. Application for a building permit shall include drawings showing proposed method of installation, structural engineering analysis and a site plan depicting structures and plantings on the property and all contiguous properties. At the request of the Enforcement Officer, documentation of a maintenance program may be required.
2. Distance of any guy anchorage or similar device shall conform to the minimum setbacks and/or yard requirements established for the zoning district in which the structure is proposed.
3. Suitable protective anti-climb fencing shall be provided and maintained around all existing and new structures and accessory attachments.

C. SOLAR ENERGY SYSTEMS

The use of Solar Energy Systems including solar collectors, storage facilities, and distribution components for the purposes of space heating/cooling, heating of water, use in industrial, commercial and agricultural processes, and the generation of electricity is a permitted use within any zoning district within the town subject to the following requirements:

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

OXNARD BROADCASTING, INC. File No. BPH-880504MG

BORCHARD FM BROADCASTING CO., INC. File No. BPH-880505PA

IST BROADCASTING, INC. File No. BPH-880505PF

For Construction Permit
for a New FM Station on Channel 275A
in Oxnard, CA

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 1992; Released: March 31, 1992

By the Commission:

1. The Commission has under consideration the applications for review filed on October 31, 1990 by Oxnard Broadcasting, Inc. ("OBI") and filed on November 1, 1990 by Borchard FM Broadcasting Co., Inc. ("Borchard") and IST Broadcasting, Inc. ("IST").[1] The applicants seek reinstatement of their above-captioned applications, which were dismissed in the Hearing Designation Order in MM Docket No. 90-416, *The Pacific FM Limited Partnership*, 5 FCC Rcd 5715, 5715-16 (MM Bur. 1990), *Erratum*, 5 FCC Rcd 6165, 6165-66 (MM Bur. 1990) ("*HDO*") (designating eleven other applications for comparative hearing).[2] For the reasons set forth below, we deny the applications for review and hold that the applications were properly dismissed pursuant to our FM "hard look" processing rules, *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19936 (May 13, 1985), *recon. denied*, 50 Fed. Reg. 43157 (October 25, 1985), *aff'd sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987)(table) ("*FM Processing Order*"),[3] because they failed to comply with the antenna height limits imposed by the *U.S. Mexico Agreement Concerning Frequency Modulation Broadcasting in the 88 to 108 MHz Band*, Nov. 9, 1972, United States - Mexico, Art. 5, § A(6)(a), 24 U.S.T. 1815, 1830, T.I.A.S. No. 7697, at 16 ("Agreement"). Our action herein is consistent with recent court precedent, *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991), *affirming Texas Media Group*, 5 FCC Rcd 2851 (1990). *See also Pike Family Broadcasting, Inc.*, 6 FCC Rcd 5552 (1991); *Quinto Broadcasting Corp.*, 6 FCC Rcd 5550 (1991).

BACKGROUND

2. On May 4, 1988, OBI filed its captioned application, which specified an effective radiated power ("ERP") of 3 kilowatts ("kW") at an antenna height above average terrain ("HAAT") of 100 meters ("m"). Similarly, the Borchard and IST applications, filed on May 5, 1988, also specified 3 kW ERP at 100 m HAAT. All three applications proposed Class A facilities to be located within 320 kilometers of the Mexican border and were therefore subject to the Agreement. On January 26, 1990, the FM processing staff returned the Borchard and IST applications because neither complied with the Agreement's power and antenna height limitations for Class A stations of 3 kW ERP at 300 feet (equivalent to 91 m) HAAT. Borchard and IST then filed, on March 7, 1990, petitions for reconsideration of the dismissals of their applications. The *HDO* denied both of the reconsideration petitions. In addition, the *HDO* dismissed the OBI application as inadvertently accepted for filing because it, too, did not comply with the Agreement's height limitations. The three applicants now seek review of these aspects of the *HDO*.

DISCUSSION

3. We deny the applications for review. Petitioners principally argue that the requirements of the Agreement and the "hard look" processing rules should be interpreted to permit border area Class A applications to propose facilities exceeding the Class A height/power limitations set forth in the Agreement in those cases (such as theirs) where the proposal satisfies the Class B mileage separations requirements set forth in the Agreement and republished in 47 C.F.R. § 73.207 (b)(3).[4] We find, however, that their argument rests on a construction of the Agreement that differs substantially from the Commission's consistent interpretation of it.

4. First, the petitioners' construction is at odds with the Commission's consistent application of the Agreement in prior "hard look" cases. *See Kerrville Radio*, 2 FCC Rcd 3441 (1987); *Westwind Radio Co.*, 3 FCC Rcd 5235 (MM Bur. 1988); *Domega Broadcasting Corp.*, 4 FCC Rcd 1450 (1989); *Kerr County Broadcasting*, 4 FCC Rcd 5021 (1989); *Texas Media Group*, 5 FCC Rcd 2851; *Pueblo Radio Broadcasting Service*, 5 FCC Rcd 6278 (1990); *Pike Family*,

[1] IST filed an Erratum on January 8, 1991. The applications for review were opposed by mutually exclusive applicants B.F.J. Timm and Raymond W. Clanton. OBI replied.

[2] The mutually exclusive application of KEXT Broadcasters, Inc. (File No. BPH-880505NB) was granted at hearing pursuant to a settlement agreement. *Memorandum Opinion and Order*, FCC 91M-1354, released April 18, 1991; *see KEXT Broadcasters, Inc.*, 6 FCC Rcd 2324 (Rev. Bd. 1991).

[3] In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265, 7269 (1991).

[4] OBI also contends that the Commission failed to provide legally adequate notice that applications must comply with the antenna height limits specified in the Agreement in order to be acceptable for filing pursuant to the "hard look" processing rules. This same argument was rejected by the *Malkan* court. *Malkan FM Associates*, 935 F.2d at 1318-20.

6 FCC Rcd 5552; *Quinto*, 6 FCC Rcd 5550. These cases hold that applications are not acceptable for filing when they specify facilities in excess of 3 kW ERP at 91 m HAAT for vacant border area allotments which are both listed as Class A domestically and which have received Mexican concurrence as Class A (such as the instant Oxnard allotment).

5. Nonetheless, the applicants contend that even though they did not fall within the Agreement's power/height limitation on Class A stations, they complied with the Agreement because they provided the distance separations to Mexican allotments and assignments required of Class B stations. We reject this argument because it presupposes, erroneously, that the Agreement's provisions governing allotments, assignment separations, and station parameters are not all equally binding. We do not dispute that the applicants meet the minimum required separations for a Class B station. However, the allotment was coordinated with Mexico as Oxnard 275A, that is, a Class A facility serving Oxnard on channel 275. The applicants do not have the freedom to change the city, channel or class of facility. Article 6 Section A requires that stations conform to the agreed-upon allotments. (It states in pertinent part: "Each Contracting Party [*i.e.*, U.S. and Mexico] shall confine the operation of its stations to the channels appearing in the Table of Allotments in Annex II to this Agreement in accordance with mutually agreed characteristics.") In this case, the Agreement contemplates a facility not exceeding 3 kW ERP at a maximum HAAT of 91 m on channel 275. Alternatively, pursuant to Article 6 Section B, the HAAT may exceed 91 m provided the ERP is reduced in an equivalent manner. The applicants did not comply with either of these sections.

6. Article 6 Section A contains a second provision:

> While this Agreement remains in force, new assignments may be made within the border area even though such assignments do not appear in Annex II, provided that those new assignments afford the protection to the allotments or assignments of the other Party in accordance with the provisions of this Agreement.

This provision cannot be taken to mean that assignments need not conform to allotments, because that interpretation would directly contradict both the immediately preceding provisions and the Agreement's definition of an assignment ("authorized use of an allotment by an actual station," *see* Agreement, Art. 3, Sect. B, Para. 19). Further, there is nothing in Article 11 (Notification Procedure) to suggest that assignment notifications may depart from the coordinated allotments or may be used to modify those allotments. We accordingly interpret this second provision in Article 6 Section A to mean that assignments made after the Agreement became effective are permissible, provided that they afford protection to other allotments and assignments in accordance with the terms of the Agreement, even if the allotments on which they operate were not a part of Annex II when the treaty entered into force.

7. Finally, OBI claims that the Commission erred in denying OBI's March 15, 1990 request that the Commission coordinate the Oxnard allotment as either a Class B or C facility. We disagree. First, the request was filed some nineteen months after the amendment as of right filing deadline of August 18, 1988. Therefore, the application was on its face unacceptable for filing as of that date and should have been returned at that point pursuant to 47 C.F.R. § 73.3522(a)(6). *See FM Processing Order*, 50 Fed. Reg. at 19937-38, 19941. In addition, we have explained that:

> A request that the Commission seek international clearance for an application not filed in accordance with the [Agreement] is, in essence, a request for waiver of our "hard look" processing requirements. In the case of multiple applicants for an allotment, such waiver would be unfair to the other applicants who fully complied with the acceptability criteria.

Memorandum Opinion and Order, MM Docket No. 88-375, 6 FCC Rcd 3417, 3423-24 (1991) (FM Class A and C3 Reconsideration Order), *recon. pending in pertinent part.*[5] In sum, waiving the "hard look" processing rules and accepting OBI's application would have been unfair to the eleven other applicants for the Oxnard allotment who complied with the acceptability criteria and were designated for a comparative hearing.[6] Also, the attendant delay in obtaining clearance would have disserved the public interest.[7]

8. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed on October 31, 1990 by Oxnard Broadcasting, Inc. and filed on November 1, 1990 by Borchard FM Broadcasting Co., Inc. and IST Broadcasting, Inc. ARE DENIED, and that the Petition for Leave to Amend filed on November 2, 1990 by Oxnard Broadcasting, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[5] Because they do not involve similar detrimental public interest consequences of delaying service to the public and prejudicing competing applicants, requests for negotiations on behalf of *existing* stations are treated differently from those by applicants for a vacant allotment. Thus, in the case of an existing Class A authorization in the Mexican border zone, the licensee or permittee may simultaneously file an application to modify its facilities to exceed 3 kW at 91 m, and a request for the Commission to obtain Mexican consent to a modification of the bilateral table. The application will not be processed until Mexican concurrence is obtained.

[6] Such waiver would also have resulted in OBI enjoying an unfair comparative coverage advantage resulting directly from its failure to comply with the power/height limitations set forth in the Agreement.

[7] OBI claims that it is "well-settled that an applicant may amend to remove a disqualifying factor, even after the commencement of hearing." OBI Application for Review at 17 (citing *Azalea Corp.*, 31 FCC 2d 561, 563 (1971)). However, the *Azalea* doctrine, which was enunciated in an AM case long before the adoption of the FM "hard look" processing rules, is inapposite to FM applications filed under the "hard look" processing system.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jefferson Cable Television Corp.,
Complainant,

v. File No. 83-0014

Georgia Power Company,
Respondent.

ORDER

Adopted: March 24, 1992; Released: March 31, 1992

By the Chief, Accounting and Audits Division:

1. On January 28, 1983, Jefferson Cable Television Corporation (Jefferson) filed the above-captioned complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a Commission determination that Georgia Power Company (Georgia Power) is charging an annual rental for available space on its poles that is in excess of the maximum just and reasonable rate.

2. On December 12, 1991, Georgia Power filed a motion to dismiss and indicated that Jefferson has agreed to the dismissal of this proceeding.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources by the parties and this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4 (i) of the Communication Act of 1934, as amended, 47 U.S.C. § 154 (i), and authority delegated by Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the complaint filed by Jefferson IS DISMISSED WITHOUT PREJUDICE and this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of	
EAGLE UPLINK CORPORATION	File Nos. 26-DSE-P/L-89 27-DSE-P/L-89 371-DSE-P/L-89
For Authority to Construct and Operate a Large Network of Small Antenna Earth Stations in the 12/14 GHz Frequency Bands	372-DSE-P/L-89 1925-DSE-AMEND-90 CSG-89-029-(4)-ML

ORDER

Adopted: March 24, 1992; Released: March 31, 1992

By the Domestic Facilities Division and International Facilities Division:

I. INTRODUCTION

1. Eagle Uplink Corporation (Eagle Uplink) has filed six related applications for authority to construct and operate a point-to-point VSAT network consisting of up to 700 remote earth stations, located throughout the United States, to provide U.S. domestic and transborder service via all U.S. domestic satellites (ALSAT), ANIK and Morelos satellites.[1] Eagle Uplink has proposed an alternative to an interlock system for this VSAT network, and has been operating the network under a special temporary authorization. For the reasons discussed below, these applications are conditionally granted, subject to the implementation of an interlock system.

II. DISCUSSION

2. The Commission has routinely authorized large networks of VSATs since 1986.[2] In the *VSAT Order*, the Commission streamlined the licensing procedure by instituting special"blanket" processing methods. The technical restrictions and power limitations adopted in the *VSAT Order* allow large VSAT networks to be routinely licensed without undermining our 2^0 orbital spacing policy for domestic fixed satellites. One of the requirements adopted in the *VSAT Order* is the use of an interlock system.[3] Subsequently, we expanded our VSAT authorization policy to include other network configurations,[4] and other types of carriers.[5] Eagle Uplink now requests that we expand our authorization policy further to include VSAT systems with no interlock systems.

3. With the growth of VSAT networks, interlock systems have been the subject of discussion both here in the United States and internationally. Because operators are not present at each remote VSAT site, an interlock system serves to guard against interference from VSAT networks into other users of the 12/14 GHz frequency bands. With an interlock system, terminals in the network may transmit "only when a specially coded signal is being received."[6] This means that if a terminal is not functioning properly, or if the VSAT antenna becomes misaligned, the terminal will not be able to receive the coded signal from the satellite and it will therefore be disabled. Only when the terminal has been realigned or repaired will it be able to transmit. This system minimizes the possibility of interference.

4. In the U.S., operators agree that an interlock system is a necessary part of a VSAT network. Similarly, the international consensus is that an interlock system is needed to limit interference to other radio spectrum users when a malfunction occurs at an unattended remote VSAT earth station. Recently, the CCIR approved a recommendation for the monitoring and control functions of VSAT earth stations.[7] The CCIR Recommendation states that a transmitting VSAT should, at least, be able to accept disable and enable commands from a Network Control and Monitoring Center or from an equivalent facility. It further states that when a fault which may cause interference is detected, the VSAT should cease transmission.

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[1] These VSAT applications were originally filed by Cylix Communications Corporation (Cylix). Cylix subsequently filed an amendment indicating that ownership had been transferred to Eagle Uplink.

[2] Declaratory Order in the Matter of Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51 Fed. Reg. 15067 (April 22, 1986) (hereinafter "VSAT Order").

[3] *See VSAT Order, supra* note 1 at para. 22.

[4] In the initial *VSAT Order, supra* note 1, a star topology was defined. In a star topology, remote, small-antenna terminals communicate with each other via a central, large-antenna hub earth station. Operational restrictions were adopted in the *VSAT Order* for both small-antenna terminals and the hub earth station. The *VSAT Order* also noted that other network configurations could be licensed in the future. VSAT systems that use a VSAT-to-VSAT (or point-topoint) network configuration similar to the network configuration of the Eagle Uplink applications were authorized in the Order in the Matter of Applications for Authority to Operate Networks of Technically Identical Earth Stations in the 12/14 GHz Frequency Bands, 2 FCC Rcd 7488 (December 21, 1987) (hereinafter "VSAT-to-VSAT Order").

[5] In Declaratory Order in the Matter of Routine Licensing of Earth Stations in the 6 GHz and 14 GHz Bands Using Antennas Less than 9 Meters and 5 Meters in Diameter, Respectively, for Both Full Transponder and Narrowband Transmissions, 2 FCC Rcd 2149 (April 13, 1987) technical restrictions were adopted to allow for the routine licensing of full transponder services and narrowband analog services at 14 GHz.

[6] *See VSAT Order, supra* note 1 at para. 22.

[7] In November 1991, the plenary session of International Radio Consultative Committee (CCIR) Study Group 4 (Fixed-Satellite Service) approved the draft new recommendation "Control and Monitoring Function of Very Small Aperture Terminals (VSATs)." (Document 4/BL/5, 7 November 1991) (hereinafter "CCIR Recommendation").

5. Eagle Uplink states that an interlock system for their point-to-point VSAT network would substantially increase their system costs and network complexity. For these reasons, Eagle Uplink proposes an alternative to an interlock system for monitoring and correcting earth station malfunctions.[8] Eagle Uplink's alternative involves manual steps. In their proposal, a Network Control Center would monitor the power and frequency of carriers transmitted from remote earth stations. A given earth station would be monitored at approximately three-minute intervals. If a malfunction is monitored, an alarm would sound and the control operator on duty would begin to identify which earth station (or earth stations) had triggered the alarm. Then, the control operator would determine whether or not each offending earth station's transmitter should be shut down. If it is determined that an earth station transmitter (or several earth station transmitters) should be shut down, the remote site(s) would be contacted via a dial-up line and shut down.

6. With Eagle Uplink's proposal, several minutes of potential interference would occur before a malfunctioning VSAT earth station is monitored and disabled. This undermines the purpose of an interlock system requirement, which is to ensure that remote VSAT earth stations are directly able to receive and respond to enable and disable transmissions, making possible the immediate cessation of malfunctioning transmissions. We will therefore require Eagle Uplink to meet this requirement.

7. Nevertheless, because Eagle Uplink initially filed its application before a domestic and international consensus on this issue was reached, and because the Eagle Uplink network has been operating under a grant of special temporary authorization, we will not dismiss its underlying application at this time. Rather, we will grant the application subject to the condition that Eagle Uplink promptly bring its system into compliance with the interlock requirement. This will allow customers to continue receiving service while Eagle Uplink installs the interlock system or will allow Eagle Uplink to arrange for an orderly termination of service if it chooses not to install the system.

8. In sum, as specified in our *VSAT Order*, we continue to require an interlock system for blanket authorization of large networks of small antenna earth stations -- independent of the particular network configuration that is implemented.

III. ORDERING CLAUSES

9. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, IT IS ORDERED that the above-captioned applications ARE CONDITIONALLY GRANTED for sixty days. During this time Eagle Uplink is to retro-fit their VSAT network with an interlock system. Upon notification to the Commission that an interlock system has been installed, the term of the authorizations will be extended to the full ten years. If, after sixty days, Eagle Uplink has not notified the Commission that it has installed an interlock system, the authorizations will become null and void, and Eagle Uplink will be required to cease operations immediately.

10. IT IS FURTHER ORDERED that the effective starting date of these authorizations is the release date of this order. Eagle Uplink is afforded thirty-one days from the effective date to decline the authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[8] Eagle Uplink suggests that the interlock requirement set forth in the *VSAT Order*, *supra* note 2, is applicable only for star network topologies. Although the choice of network configuration will determine how an interlock system is implemented, the requirement for an interlock system is not dependent on using a star network configuration. The *VSAT-to-VSAT Order*, *supra* note 4, does not modify the requirement for an interlock system.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 90 of the Rules Governing the Local Government and Special Industrial Radio Services in the 450-470 MHz Band	RM-7480

ORDER

Adopted: March 24, 1992; Released: March 31, 1992

By the Chief, Private Radio Bureau:

1. On July 31, 1990, the Special Industrial Radio Service Association, Inc. ("SIRSA") petitioned to amend Part 90 of the Commission's Rules.[1] SIRSA claims that many of its members in certain midwestern states (all of which have a heavy agricultural base) have experienced a critical shortage of VHF and UHF spectrum.[2] Accordingly, SIRSA has requested the reassignment of six channel pairs in the 450-470 MHz band currently assigned to the Local Government Radio Service ("LGRS") under Section 90.17 of our Rules. SIRSA's petition specifically requests that these six channel pairs be made available to primarily agricultural businesses in the following midwestern states: Iowa, Kansas, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin. We find, for the reasons stated below, that further action on SIRSA's petition should not be taken.

2. The Commission recently issued a Notice of Inquiry in PR Docket No. 91-170, 6 FCC Rcd 4126 (1991) ("NOI"), addressing the problem of private land mobile frequency congestion below 470 MHz. The NOI noted that since 1958, when we organized user groups into the current 19 private land mobile radio services, channel utilization has not been even across these 19 groups. The Commission is, therefore, well aware that there is crowding in the existing pools, including those addressed in the SIRSA petition, and that our existing interservice sharing procedures are not a sufficient means of relieving this congestion.[3] Accordingly, issues relating to the Commission's interservice sharing rules and the continuing viability of all service pools below 800 MHz will be addressed, in a broader context, in the above-mentioned proceeding. In light of the Commission's intention to address these issues more fully in this proceeding, it would not be productive -- for reasons of administrative economy -- to address these issues separately in the very specific context raised in SIRSA's petition.

3. Accordingly, pursuant to Sections 0.331, 1.401 and 1.407 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.401 and 1.407, IT IS ORDERED that the petition filed by the Special Industrial Radio Services, Inc., RM-7480, IS DISMISSED.

4. For further information contact Tatsu Kondo, Rules Branch, Private Radio Bureau, (202) 643-2443.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

[1] SIRSA's petition was put on public notice on September 5, 1990. The Associated Public-Safety Communications Officers, Inc. ("APCO") and the State of Minnesota, Department of Transportation ("Minnesota"), filed comments opposing the petition, and SIRSA replied. The State of Nebraska, Department of Administrative Services ("Nebraska"), filed late comments opposing the petition for rule making. Informal comments in support of the petition were also received from 12 Special Industrial eligibles engaged in agricultural-related businesses.

[2] SIRSA petition at 4.

[3] The NOI noted that even in smaller markets, such as the nine midwestern states named in SIRSA's petition, there is spectrum crowding. 6 FCC Rcd at 4128 n.30, 4136 n.105.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

Solar Vision Corporation — File No. 13275-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on F-group Channels at Modesto, California

MEMORANDUM OPINION AND ORDER

Adopted: March 25, 1992; Released: March 31, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of Solar Vision Corporation (Solar) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels to serve the Modesto, California area was selected for qualification review as the result of a Commission lottery. Continental Cablevision of California (Continental) filed a post-lottery Petition to Deny, challenging the application. Solar filed an Opposition to the Petition.

2. *Pleadings.* In its Petition, Continental contends that Solar failed to adequately demonstrate its financial qualifications to be an MMDS licensee in violation of Section 21.17 of the Commission's Rules, 47 C.F.R. Sec. 21.17. In its opposition, Solar argues that Continental's Petition "is not at all directed at Solar Vision, but rather, is calculated to delay the entry of competition into a market in which Continental is presently a monopolist." Solar Opposition at 2. Responding to the allegation that it failed to adequately demonstrate its financial qualifications, Solar submits an updated financial statement.

3. *Discussion.* The Court of Appeals for the Distrct of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show...that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity," 47 U.S.C. Sec. 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. Sec. 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985).

4. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). In the instant case, Continental alleges the apparent existence of a financial qualification violation. After consideration of Continental's allegations we are persuaded that the asserted violations, standing alone, and, if assumed to be true, fail to sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. *See Jack G. Hubbard*, 5 FCC Rcd 1318 (Dom. Fac. Div. 1990); *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990); *Jody Barnes*, 3 FCC Rcd 5177 (Dom. Fac. Div. 1988).

5. With regard to Continental's allegation that Solar failed to adequately demonstrate its financial qualifications pursuant to Section 21.17, we note that since Continental's petition to deny was filed, the Commission revised Section 21.17 in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), to allow applicants to submit a financial certification of their ability to meet estimated construction costs and expenses of operating for a period of one year.[1] *Id.* at 5752-53 n.57. In view of the policy adopted by the Commission in that rulemaking order, Solar will be required to submit a financial certification.

6. *Ordering Clause.* Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Continental's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petition to Deny filed by Continental Cablevision of California, Inc. IS HEREBY DENIED.

7. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. Sec. 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. Sec. 1.4(b)(2).

[1] It should be emphasized that the financial certification requirement does not abrogate the requirement that an applicant must demonstrate that it is financially qualified. The new Section 21.17 changes only the manner in which such demonstration is made.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. USP-92-(W)-017

Petition for Waiver of the International Settlements Policy for USADirect Switched Voice Option Between the United States and the United Arab Emirates

MEMORANDUM OPINION AND ORDER

Adopted: March 25, 1992; Released: March 26, 1992

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 13, 1991, American Telephone and Telegraph Company (AT&T) filed a petition for waiver, File No. USP-92-(W)-017, pursuant to the Commission's International Settlements Policy (ISP),[1] and Section 64.1001 of the Commission's Rules, 47 C.F.R. § 64.1001, for a change in the switched voice accounting rate to permit the introduction of AT&T's USADirect service from the United Arab Emirates (UAE).[2] For the reasons expressed herein, we deny AT&T's waiver request.

II. SUMMARY OF PLEADINGS

AT&T's Request for Waiver

2. AT&T requests that it be permitted to introduce USADirect service with the Emirates Telecommunications Corporation Ltd. (Etisalat) between the United States and the UAE and to establish an accounting rate with Etisalat of $2.00 per minute, to be divided equally. AT&T states that this accounting rate matches the current peak per minute accounting rate for International Message Telephone Service (IMTS) with the UAE. AT&T adds that the UAE has required that, as a condition for establishing service, AT&T agree to include in the USADirect settlement minutes any call set-up time that exceeds thirty seconds in duration. AT&T states that it has agreed to this "premium accounting rate payment" under protest.[3] AT&T states that it has made the arrangement, however, because Etisalat has provided AT&T documentation which it believes indicates that MCI has agreed to the same terms and conditions as AT&T's proposed accounting rate.[4]

3. AT&T states that it believes that the U.S. public interest is best served by a Commission decision which rejects the imposition of premium accounting rate payments, such as that produced by the inclusion of call set-up time in the settlement formula, for USADirect or similar services.[5] However, AT&T states that if the Commission does not take immediate action to order MCI to refrain from offering CALL USA under the premium arrangement, AT&T has no alternative but to seek Commission approval of its ISP waiver request to establish its USADirect service under the same terms pending Commission resolution of AT&T's informal complaint.[6] AT&T states that unless it can offer its USADirect service in competition with CALL USA from the UAE, holders of AT&T calling cards will be denied service, and, as a result, the reputation of AT&T's card will be in large measure irreversibly diminished.

MCI Opposition

4. On November 26, 1991, MCI filed an opposition to AT&T's petition for waiver. MCI states that AT&T erroneously contends that MCI is violating the ISP because its accounting rate with the UAE provides that completed call set-up periods longer than 30 seconds in duration are to be reflected in settlements. MCI states that it demonstrates in its response to AT&T's informal complaint that the agreement to which AT&T alludes related to a recently concluded "trial" of CALL USA service that will not result in MCI making any premium accounting rate payments to the UAE. MCI asserts that it was able to complete call set-up of its MCI CALL USA from the UAE within 30 seconds. Further, MCI states that it is in the process of negotiating a permanent operating agreement with the UAE for this service and fully expects that this agreement will similarly result in settlements at standard rates. In this light, MCI concludes that there is no justification for granting AT&T a waiver of the ISP.

AT&T Reply

5. On December 9, 1991, AT&T filed a reply to MCI's opposition. AT&T states that MCI's agreement with Etisalat, to settle its CALL USA service at a non-uniform accounting rate, should not be tolerated. Thus, AT&T asserts, the Commission should grant AT&T's complaint and suspend MCI's tariff for CALL USA service from the UAE. AT&T argues that, in the alternative, the Commission should permit AT&T to establish its USADirect service with the UAE on the same terms and conditions as MCI's CALL USA service, subject to the Commission's decision on AT&T's complaint, and to require MCI to forfeit the profits it has realized as a result of its violation of the ISP and acceding to Etisalat's whipsawing behavior.

III. DISCUSSION

6. In this *Order*, we deal solely with the merits of AT&T's petition for waiver of the Commission's ISP and find that it is in the public interest to deny the AT&T request for waiver. Specifically, AT&T has not borne the burden of proof that a waiver of the ISP for a higher, non-uniform, IMTS accounting rate for USADirect Service with the UAE is in the public interest.[7]

7. Under the ISP waiver procedures, AT&T must demonstrate that it is in the U.S. public interest for us to permit an accounting rate arrangement for USADirect different from its other IMTS options between the United States and the United Arab Emirates. However, AT&T itself expressly notes that "the public interest is best served by a Commission decision which *rejects* the imposition of premium accounting rate payments, such as that produced by the inclusion of call set-up time in the settlement formula, for USADirect or similar services."[8]

Moreover, AT&T does not seek to demonstrate that USADirect is, in fact, different from other IMTS options.[9] Instead, AT&T's public interest demonstration relies on its assertion that there are significant market opportunities in the UAE and that unless AT&T can offer its USADirect service in competition with CALL USA from the UAE, the holders of AT&T calling cards will be denied service, and, as a result, the reputation of AT&T's card will be in large measure irreversibly diminished.[10] By relying on the arguments presented herein, AT&T has not borne its burden of demonstrating that the United States and U.S. ratepayers would benefit from the proposed change in the accounting rate through, for example, improved services, increased competition and lower rates.[11] Therefore, we cannot conclude that it is in the U.S. public interest to permit AT&T to agree to a higher, non-uniform, IMTS accounting rate for USADirect from the UAE.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the AT&T petition, File No. USP-92-(W)-017, for waiver to permit a non-uniform IMTS accounting rate for USADirect service from the United Arab Emirates is DENIED IN FULL.

9. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Regulation of International Accounting Rates, *Report and Order (Phase I)*, 6 FCC Rcd 3552 (1991) *(Phase I Report and Order)*.

[2] USADirect is an AT&T service that enables a caller, using a phone in another country, to call a toll-free number and be connected with an AT&T operator in the United States. That operator, in turn, forwards the telephone call to its U.S. destination. The charge for a USADirect call appears on the caller's monthly AT&T bill. AT&T settles the account as if it were a U.S.-outbound telephone call.

[3] On November 13, 1991, AT&T also filed with the Commission an informal complaint against MCI arguing that MCI's CALL USA service option from the UAE is being offered in violation of the Commission's ISP. MCI's CALL USA service option operates in the same manner as AT&T's USADirect service option.

In its complaint, AT&T alleges that it has been subject to whipsawing by UAE, and as a result has suffered significant harm because UAE has refused to permit AT&T to establish its USADirect service from the UAE unless and until AT&T agrees to pay the same premium accounting rate as that agreed to by MCI. AT&T requests that the Commission suspend MCI's CALL USA service from the UAE, pending Commission investigation and resolution of AT&T's complaint. *See* Informal Complaint Against MCI Communications Corporation Accounting Rate Agreement with United Arab Emirates, page 2 (File No. IC 92-01315, filed November 13, 1991). In this decision, we deal solely with the merits of AT&T's petition for waiver of the ISP. However, based on our decision here, the Bureau will request MCI to provide additional information regarding MCI's settlement agreement with UAE.

[4] *See* Exchange of Telexes between MCI and the UAE for establishing MCI's CALL USA, AT&T's Petition for Waiver, Attachment 1.

[5] *Citing*, AT&T and MCI, 5 FCC Rcd 4618 (Com. Car. Bur. 1990) *(Telefonica)*.

[6] In its waiver request, AT&T sought to establish USADIRECT service in the UAE by December, 1991, to take advantage of significant market opportunities presented by the likely presence of U.S. military personnel there at that time.

[7] It is well established Commission policy that the petitioner bears the burden of demonstrating that a waiver of the Commission's ISP is in the U.S. public interest. *See, e.g., Phase I Report and Order*, supra note 1 at 3554-55.

[8] AT&T Petition for Waiver at 3 (emphasis added).

[9] To the contrary, AT&T tariffs this service as IMTS. *See* AT&T Communications, Tariff F.C.C. No. 1.

[10] AT&T Petition for Waiver at 4.

[11] *See, e.g.*, Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes, CC Docket No. 85-204, 51 Fed. Reg. 4636 (1986); *on recon.*, 2 FCC Rcd 1117 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Napa Cellular Telephone Company — File No. 63500-92-7-KSK

Notice of Apparent Liability for Forfeiture Penalty for station KNKA757 in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A in Market 111, Vallejo-Fairfield-Napa MSA

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 25, 1992; Released: April 1, 1992

By the Chief, Mobile Services Division:

1. Napa Cellular Telephone Company (Napa) is the licensee of Market 111 on the block A frequency in the Vallejo-Fairfield-Napa MSA. On August 1, 1991, Napa filed FCC Form 489, Notification of Status of Facilities, to notify the Commission of operation of an additional cell site in Vacaville, California. Napa began serving the public at the Vacaville cell on July 24, 1991. Napa stated that due to an administrative error, the Commission was not notified of the cell's operation on July 24, 1991.

2. Section 22.9(b)(1) of the Commission's rules states:

> Notification of status of facilities. (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day the Form 489 is placed in the mail to the FCC.

Therefore, because Napa commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter... shall be liable to the United States for a forfeiture penalty.

We find that Napa's failure to file a FORM 489 until August 1, 1991, constitutes willful and repeated conduct within the term of the statute.

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), 56 Fed. Reg. 37665 (1991), *recon. pending*, the base forfeiture amount for failing to file required forms is $30,000. Consistent with this *Policy Statement*, we are adjusting downward the forfeiture to $6,000 because failing to file a FCC Form 489 is a relatively minor violation and because Napa voluntarily disclosed its failure to file the FCC Form 489.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 503(b), and Section 1.80 of the Commissions rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that Napa Cellular Telephone Company IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

MM Docket No. 91-361

In the Matter of

Amendment of Section 73.202(b), RM-7502
Table of Allotments,
FM Broadcast Stations.
(Houma and Chalmette,
Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 17, 1992; Released: March 31, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Guaranty Broadcasting Corporation ("petitioner"), licensee of Station KCIL-FM, Channel 298C1, Houma, Louisiana, the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 40 (1992), proposing the reallotment of Channel 298C1 from Houma to Chalmette, Louisiana, and the modification of Station KCIL-FM's license to specify Chalmette as its community of license. Newmarket Media Corporation, licensee of Station WNOE-FM, New Orleans, Louisiana, filed comments opposing the reallotment of Channel 298C1 from Houma to Chalmette.[1] Petitioner subsequently filed a request for withdrawal of its petition for rule making.[2]

2. In accordance with Commission policy, we will grant petitioner's request for withdrawal of its rule making proposal.

3. Accordingly, IT IS ORDERED, that the petition for rule making of Guaranty Broadcastiang Corporation, seeking reallotment of Channel 298C1 from Houma to Chalmette, Louisiana, and modification of petitioner's license for Station KCIL-FM to specify the change of community, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

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[1] These comments need not be addressed, given our resolution of this proceeding.

[2] In accordance with Section 1.420(j) of the Commission's Rules, petitioner states that it received no money or other consideration in exchange for withdrawing its expression of interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-58

In the Matter of

Amendment of Section 73.202(b), RM-7947
Table of Allotments,
FM Broadcast Stations.
(East Brewton, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 17, 1992; Released: March 31, 1992

Comment Date: May 22, 1992
Reply Comment Date: June 7, 1992

By the Acting Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Escambia Creek Indian Broadcasting Company ("petitioner") requesting the allotment of FM Channel 239A to East Brewton, Alabama, as that community's first local aural transmission service. Petitioner stated its willingness to apply for the channel, if allotted.

2. A staff engineering review of the proposal reveals that Channel 239A can be allotted to East Brewton in compliance with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 12.0 kilometers (7.4 miles) north of the community.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 239A to East Brewton, Alabama, since an interest has been expressed in providing that community with its first local aural transmission service. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to East Brewton, as follows:

	Channel No.	
City	Present	Proposed
East Brewton, Alabama	--	239A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 22, 1992,** and reply comments on or before **June 7, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

M. Scott Johnson, Esq.
Catherine M. Withers, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates used for Channel 239A are 31-12-07 and 87-02-03. The imposition of a site restriction is required to avoid a short spacing to the licensed site of Station WAVH(FM), Channel 241C, Mobile, Alabama, at coordinates 30-41-20 and 87-49-49, as well as to the authorized site of Station WKNU(FM), Channel 292A, Brewton, Alabama, at coordinates 31-06-45 and 87-01-19.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-558
MM Docket No. 90-527

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Albany, Cameron, Columbia, Gallatin, Huntsville, Malta Bend and Marshall, Missouri)[1]	RM-6891; RM-6924; RM-7130; RM-7275; RM-7302; RM-7490; RM-7723; RM-7724

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 19, 1992; Released: March 31, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it two interrelated docketed proceedings which are being consolidated for resolution. In MM Docket No. 89-558, a *Notice of Proposed Rule Making*, 4 FCC Rcd 8484 (1989), was issued at the request of Cameron Radio, Inc. ("CRI") requesting the substitution of Channel 261C2 for Channel 222A and modification of its construction permit to specify operation on the higher channel at Cameron, Missouri (RM-6924). In MM Docket No. 90-527 the *Notice of Proposed Rule Making*, 5 FCC Rcd 6590 (1990), addresses two mutually exclusive petitions. One petition was filed by Ms. Garnet Tuttle ("Tuttle") requesting the allotment of Channel 248C2 to Marshall, Missouri (RM-7302). The other petition was filed by Contemporary Broadcasting, Inc. ("CBI") requesting the substitution of Channel 247C2 for Channel 223A at Huntsville, Missouri (RM-7490).

2. During the reply period for the *Notice* in MM Docket No. 89-558, York David Anthony ("Anthony") filed a timely counterproposal requesting an allotment of Channel 261C2 to Albany, Missouri as that community's first local service (RM-7275).[2] Miles Carter ("Carter") filed a petition, which was accepted as a counterproposal, requesting an allotment of Channel 268C2 or 269C2 to Malta Bend, Missouri as that community's first local service (RM6891). Columbia FM, Inc. ("CFI") filed a petition, which was accepted as a counterproposal requesting an upgrade from Channel 268C2 to Channel 268C1 at Columbia, Missouri (RM-7130).[3] CRI and Anthony filed joint comments in response to Anthony's counterproposal. Carter filed reply comments in which he adopted a suggestion that Channel 248C2 be allotted to Malta Bend, in lieu of his earlier proposal. CFM filed reply comments. After the close of the comment period, Kenneth Kuenzie ("Kuenzie") filed an untimely counterproposal requesting an allotment to Norborne, Missouri as that community's first local FM service.[4]

3. During the reply period for the *Notice* in MM Docket No. 90-527 Tuttle filed supporting comments. Carter filed a timely counterproposal requesting the allotment of Channel 248C2 at Malta Bend (RM-7723), and CFI filed comments supporting the Carter counterproposal. Missouri Valley Broadcasting, Inc. ("MVB") filed a timely counterproposal requesting an allotment of Channel 248C2 to Gallatin, Missouri as that community's first local FM service (RM-7724).[5] CBI filed supporting comments and suggested alternate channels for allotment to Huntsville and Marshall. MVB filed reply comments to the counterproposals. CBI filed reply comments and a request for Severance and Immediate Grant.[6]

4. After the close of the comment period, Anthony filed a request to dismiss his petition.[7] CFI, Tuttle, MVB and Carter filed a Request for Leave to File Joint Supplemental Comments and Joint Supplemental Comments in MM Docket No. 89-588 and they filed Joint Reply Comments and Settlement Agreement, in MM Docket No. 90-527. Simultaneously, Tuttle filed a Request for Approval to Dismiss Petition for Rule Making and for Withdrawal of Expression of Interest.[8] Kuenzie filed a partial opposition to the Joint Supplemental Comments in MM Docket No. 89-558.[9]

5. The settlement proposed by the parties sets forth the following allotment plan. Channel 278C2 may be substituted for Channel 223A, and their construction permit for

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[1] The communities of Albany, Columbia, Gallatin and Malta Bend, Missouri, have been added to the caption.

[2] Public Notice of Anthony's counterproposal was given in Report No. 1807, February 6, 1990.

[3] Public Notice of the Columbia and CFI counterproposals was given in Report No. 1810, March 15, 1990.

[4] Kuenzie's counterproposal was unacceptable because it was filed after the deadline for initial comments. The period for filing initial comments ended January 29, 1990. Kuenzie filed his counterproposal on March 29, 1990, in response to the public notice dated March 15, 1990 of a counterproposal filed during initial comments. Section 1.420(d) of the Commission's Rules and paragraph 3(a) of the Appendix to the *Notice* make clear that counterproposals must be submitted in initial comments only and will not be considered if advanced in reply comments. *See, e.g., Implementation of BC Docket 89-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 (1990), *Grove City, Pennsylvania*, 4 FCC Rcd 7904 (1989), *Vancouver, Washington*, 4 FCC Rcd 839 (1989). Therefore, Kuenzie's counterproposal was unacceptable, was never placed on public notice and is formally dismissed herein. Because Kuenzie's counterproposal was never accepted, a Joint Motion to Dismiss filed by CFM, CRI and Anthony is moot, as is Kuenzie's Opposition and a joint reply filed by CFM, CRI and Anthony.

[5] Public Notice of the Carter and MVB counterproposals was given May 15, 1991, Report No. 1845.

[6] Because the Settlement, discussed *infra*, resolves the issues raised by CBI, the Request for Severance and Immediate Grant is moot and is dismissed herein.

[7] Anthony's request to withdraw his proposal was filed prior to the effective date of Section 1.420(j), and, therefore, the provisions of that rule are inapplicable to his proposal.

[8] Pursuant to Section 1.420(j) of the Commission's Rules, Tuttle has filed all of the requisite certifications with her request.

[9] As noted above, Kuenzie's counterproposal was unacceptable at the time it was filed. His opposition is therefore moot.

Station KTDI(FM), Hunstville, modified accordingly, to provide that community with wide coverage FM service. Channel 248C3 may be allotted to Malta Bend and Channel 269C3 may be allotted to Gallatin, as each community's first local FM service. Channel 261C2 may be substituted for Channel 222A, and the license of Station KDEE(FM), Cameron, modified accordingly, to provide that community with wide coverage FM service. Finally, Channel 268C1 may be substituted for Channel 268C2, and the license of Station KARO(FM), Columbia, modified accordingly, to provide that community with improved FM service. The settlement would require acceptance of the requests of Anthony (Channel 269C2 at Albany), and Tuttle (Channel 248C2 at Marshall), to withdraw their respective petitions. A statement of continuing interest is included by each of the parties receiving an allotment or upgrade pursuant to the settlement agreement, and a separate statement of continuing interest was submitted in the earlier reply comments of CBI.

6. We believe it is in the public interest to accept the proposed allotment scheme of the settlement agreement and grant the requests to withdraw the two outstanding petitions. Doing so will resolve all of the outstanding allotment issues in both of these docketed proceedings.[10] For this reason we need not discuss the pleadings further, nor make a comparative analysis of the various proposals suggested therein.

7. A Commission engineering analysis has determined that the new allotments and upgrades proposed in the settlement can be made in compliance with minimum spacing rules and city grade coverage requirements. Channel 261C2 can be substituted for Channel 222A at to Cameron with a site restriction of 28.4 kilometers (17.6 miles) north.[11] Channel 268C1 can be substituted for Channel 268C2 at Columbia at its current transmitter site with a site restriction 12.8 kilometers (8 miles) northwest.[12] Channel 269C3 can be allotted to Gallatin with a site restriction 11.5 kilometers (7.1 miles) south.[13] Channel 278C2 can be substituted for Channel 223A at Huntsville with a site restriction 12.6 kilometers (8 miles) northwest.[14] Channel 248C3 can be allotted to Malta Bend without a site restriction.[15] Pursuant to Rule 1.420(g), the authorizations of Station KTDI(FM), Huntsville, Station KDEE(FM) Cameron and Station KARO(FM), Columbia, will be modified to specify the new channels.[16]

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 15, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Cameron, Missouri	261C2
Columbia, Missouri	268C1
Gallatin, Missouri	269C3
Huntsville, Missouri	278C2
Malta Bend, Missouri	248C3

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KDEE(FM), Cameron, Missouri IS MODIFIED to specify operation on Channel 261C2 in lieu of Channel 222A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KARO(FM), Columbia, Missouri IS MODIFIED to specify operation on Channel 268C1 in lieu of Channel 268C2, subject to the following conditions:

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[10] We note that although CBI did not join in the settlement agreement, their petition is resolved therein. They did not comment or object after being served with the settlement agreement.

[11] The coordinates for Cameron (RM-6924) are 39-59-02 North Latitude and 9408-26 West Longitude.

[12] The coordinates for Columbia (RM-7130) are 39-03-00 North Latitude and 9225-00 West Longitude. We note that Chahnel 268C1 at Columbia is currently short spaced to Station KTXR, Channel 268C, Springfield, Missouri, which was ordered to move to Channel 267C in MM Docket No. 86-103, 4 FCC Rcd 5645 (1989). A copy of this *Report and Order* will be served on the licensee of Station KTXR, Channel 268C, Springfield, Missouri. Final grant of authorization to Station KARO(FM) to operate on Channel 268C1, may be withheld until Station KTXR, Springfield is authorized to operate on Channel 267C.

[13] The coordinates for Gallatin (RM-7724) are 39-48-56 North Latitude and 93-54-35 West Longitude.

[14] The coordinates for Huntsville (RM-7490) are 39-29-45 North Latitude and 92-25-05 West Longitude. We note that these coordinates are different from those which were originally submitted, as well as those which CBI submitted in reply comments. However, because CBI indicates in initial comments, as well as reply comments, its intent to change transmitter sites, use of the above coordinates is apprpropriate to facilitate all of the requested upgrades and allotments. *See, e.g., Greenville, Texas*, 6 FCC Rcd 6048 (1991).

[15] The coordinates for Malta Bend (RM-6891/7723) are 39-11-48 North Latitude and 93-21-42 West Longitude.

[16] No additional expressions of interest were received for the Cameron and Huntsville nonadjacent channel substitutions.

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KTDI(FM), Huntsville, Missouri IS MODIFIED to specify operation on Channel 278C2 in lieu of Channel 223A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

12. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Contemporary Broadcasting, Inc., licensee of Station KTDI(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade

13. The window period for filing applications for Channel 269C3 at Gallatin will open on **May 18, 1992** and close on **June 17, 1992.**

14. The window period for filing applications for Channel 248C3 at Malta Bend will open on **May 18, 1992** and close on **June 17, 1992.**

15. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to Stereo Broadcasting, Inc., 3000 East Chestnut Expressway, Springfield, Missouri (licensee of Station KTXR, Channel 268C, Springfield, Missouri).

16. IT IS FURTHER ORDERED, That the Request for Dismissal of Counterproposal filed by York David Anthony IS GRANTED (RM-7275).

17. IT IS FURTHER ORDERED, That the Request for Approval to Dismiss Petition for Rule Making and for Withdrawal of Expression of Interest filed by Ms. Garnet Tuttle is GRANTED (RM-7302).

18. IT IS FURTHER ORDERED, that the untimely counterproposal filed by Kenneth Kuenzie is DISMISSED.

19. IT IS FURTHER ORDERED, That the Request for Severance and Immediate Grant filed by Contemporary Broadcasting, Inc. is DENIED.

20. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

21. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-429

In the Matter of

Amendment of Section 73.202(b),	RM-6874
Table of Allotments,	RM-7206
FM Broadcast Stations,	RM-7256
(Wellington, Wichita, and Andover, Kansas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 20, 1992; Released: March 31, 1992

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Johnson Enterprises, Inc. ("Johnson"), licensee of Station KZED(FM), Wellington, Kansas, the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7127 (1989) (*"Notice"*), proposing the substitution of Channel 230C2 for Channel 228A at Wellington, Kansas and the modification of Johnson's license to specify operation on the upgraded channel. Johnson filed comments restating its intention to apply for the channel if allotted and reply comments. Willie Kendrick ("Kendrick") filed a Petition for Rule Making requesting the allotment of Channel 231A to Wichita, Kansas as that community's sixth local FM service (RM-7206).[2] Jonathan Fricke ("Fricke") filed a counterproposal requesting the allotment of Channel 230C3 at Andover, Kansas, as that community's first local transmission service (RM-7256).[3] Dana Puopolo ("Puopolo") filed comments.[4] Gregory Ray Steckline ("Steckline"), an applicant for Channel 283A at Augusta, Kansas, filed an Opposition to Fricke's counterproposal, a supplementary certificate of service, and an engineering statement.[5]

2. In support of his counterproposal, Fricke states that Andover, a community listed in the U.S. Census, would receive its first local transmission service. He argues that a first local service is preferable to a channel upgrade at Wellington.

3. In support of his counterproposal proposing the allotment of Channel 231A to Wichita as that community's fifth local commercial FM station, Kendrick states that he is a black American who resides in Wichita. He claims that the population of Wichita is approximately 289,000, and that 14.3 per cent of that population are members of minority groups. He notes that "only" six AM and five commercial FM stations are currently licensed to Wichita. Kendrick adds that if the channel is allotted, he will apply for a permit to operate thereon.

4. In its Reply Comments responsive to the counterproposal of Fricke, Johnson makes three arguments in support of its showing that there is a greater need for its Wellington upgrade than for the allotment of new service at Andover. First, Johnson submits that the small size (population 2,801)[6] of Andover makes a Class A channel more than adequate to serve that community's needs. It argues that if Channel 263A was allotted to Andover, the result would be a more efficient use of spectrum, as Wellington could also receive an upgrade.[7] Second, it contends that Fricke's choice of a Class C3 channel reflects only Fricke's private preference for a higher class channel than is needed by the Andover community, and that precedent prevents the Commission from indulging private preference at the expense of the public interest.[8] Third, using total service-area coverage (measured in square kilometers) as the sole criterion for comparison, Johnson asserts that the service area of his Class C2 upgrade would provide a greater "gain area" in square

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[1] The communities of Wichita and Wellington have been added to the caption.

[2] Kendrick originally filed a Petition for Rule Making on September 20, 1989 requesting the Channel 231A allotment at Wichita. That petition was returned as technically deficient because the coordinates Kendrick proposed were short-spaced to Station KWKS, Channel 232A, Winfield, Kansas and to the counterproposal filed in this proceeding to allot Channel 230C3 to Andover, Kansas. Kendrick subsequently filed a Petition for Reconsideration of that action. Rather than rule on the merits of the reconsideration, we treated Kendrick's proposal as a counterproposal in this proceeding, and placed it on public notice on December 20, 1989. *See* Public Notice #1804.

[3] Fricke's counterproposal was placed on public notice on February 6, 1990. *See* Public Notice # 1807.

[4] Puopolo's comments contained an expression of interest in Kendrick's proposal. However, his expression of interest was late-filed because it was filed on January 4, 1990, more than a month after the November 27, 1989 deadline for filing initial comments. Accordingly, Puopolo's expression of interest is not eligible for consideration in this proceeding. *See, e.g., Carolina Beach et al., North Carolina*, 7 FCC Rcd 544 (1992).

[5] Steckline objects to the Andover proposal on the grounds that the allotment would be short-spaced to his application (BPH-880727MO) for Channel 242A, Augusta. As an initial matter, Steckline's Opposition is ineligible for consideration because it was filed on February 22, 1990, over two months after the December 12, 1989 deadline for filing reply comments in this proceeding. However, even if the Opposition and related pleadings had been timely filed, Steckline's objections are moot, as he was granted the construction permit for Channel 242A at Augusta, Kansas. He has also received an upgrade of the channel to a Class C2 facility at a fully spaced site. *See Report and Order (Augusta, Kansas)*, 6 FCC Rcd 2043 (1991). Allegations made by Steckline of misconduct on the part of an engineer who assisted a co-applicant for Channel 242A at Augusta, and premised on a civil suit pending in Kentucky, have also become moot, as the case has been settled. *See Order* of January 3, 1992 in *New West Radio vs. Ernestine Hall et al.*, Civil Action No. 89-214, U.S. District Court (E.D. Ky).

[6] Johnson cites the 1989 *Rand McNally Road Atlas* as the basis for his population data.

[7] Johnson cites *Endicott, New York*, 51 FCC 2d 50 (1975) as the basis for its spectrum efficiency argument.

[8] Johnson submits that *West Palm Beach, Florida*, 6 RR 2d 1514 (1965) requires that the public interest prevail over private interest. It also argues that *Miami, West Virginia*, 58 RR 2d 146, 148 (M.M. Bur. 1985); *Micanopy and Williston, Florida*, 50 RR 2d 1425 (B.Bur. 1982); and *Marshfield, Massachusetts*, 33 RR 2d 611, 613 (B.Bur. 1975), authorize the Commission to achieve greater spectral efficiency through multiple allotments, even if that clashes with a private preference for a specific channel.

kilometers than the allotment of a Class C3 new allotment at Andover, and that the service area of a combined Class C2 allotment at Wellington and a Class A allotment at Andover would exceed by an even greater number of square kilometers the service area of a sole Class C3 allotment at Andover. Accordingly, Johnson proposes that the Commission both grant Johnson its upgrade request and allot Channel 263A to Andover.

5. Johnson also opposes Kendrick's counterproposal on three grounds. First, Johnson argues that Kendrick never filed technically acceptable site coordinates for his counterproposal. Specifically, Johnson recounts that the Commission dismissed Kendrick's original Petition for Rule Making as unacceptable for filing because the site coordinates proposed for the Wichita allotment were short-spaced to Channel 232A, Winfield, Kansas. Johnson also notes that when Kendrick filed a Petition for Reconsideration of the dismissal, he did not propose specific coordinates, but only "a site located 1.44 kilometers to the north-northwest of Wichita reference point...". Johnson argues that the submission by a proponent of an allotment of a general area for the site of an allotment, rather than specific coordinates, is in violation of both Sections 1.401(c) and 73.208(a)(1) of the Commission's rules. Accordingly, Johnson requests that the Commission's decision treating the Petition for Rule Making as a counterproposal should be rescinded and that Kendrick's counterproposal be dismissed.

6. Second, Johnson contends that there is no site within the area described by Kendrick, or any other site, at which an FM station operating on Channel 231A can comply with the Commission's distance separation and city-grade service requirements. Johnson cites to *Clemson, South Carolina*, 2 FCC Rcd 3583 (1988), as precedent requiring that, in allotment proceedings, a proponent must guarantee that 100% of the community of license will receive a city-grade signal from the allotment site specified. Johnson concludes that neither Kendrick nor any proponent of a Class A Channel at Wichita can comply with this requirement.

7. Third, Johnson claims that under the allotment priorities, its upgrade should be considered superior to Kendrick's proposal because it would utilize spectrum more efficiently. Johnson asserts that his proposed Class C2 facility would serve a geographic area 469 per cent greater than Kendrick's Class A proposal. He adds that he can situate the transmitter of an upgraded Station KZED-FM at a site from which the 1 mV/m contour of that station would completely encompass the 1 mV/m contour of Kendrick's hypothetical Channel 231A Wichita facility. He also asserts that his upgrade proposal is preferable because it would provide increased and needed public health and safety services to underserved rural farmland area surrounding Wellington, while Wichita is already well served by four Class C FM facilities, one Class C1 FM facility, and six AM stations. Johnson further contends that his upgrade should be preferred because it comports with the Commission's policy "encouraging licensees to improve their licensed channels... to the fullest extent the FM technical rules allow".[9]

8. Conflicting proposals are comparatively considered under the guidelines set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) (*"Revision"*), as follows:

> (1) first full-time aural service;
>
> (2) second full-time aural service;
>
> (3) first local service; and
>
> (4) other public interest matters.
>
> (Co-equal weight is given to priorities (2) and (3).)

Johnson's proposal at Wellington, and Kendrick's and Fricke's counterproposals at Wichita and Andover, respectively, must be comparatively considered. A Commission staff engineering review indicates that each proposal is mutually exclusive with the other two and that no alternative channels are available in any of the three communities. Accordingly, only one requested allotment can be made out of the group of three proposals.

9. Johnson's suggestion that we allot Channel 263A to Andover in lieu of Channel 230C3 is unacceptable for consideration, as no party has expressed an interest in applying for a Class A channel in that community. We will not allot a channel to a community absent an expression of interest in applying for that channel. *See, e.g., Carolina Beach et al., North Carolina*, 7 FCC Rcd 544, 545 (1992). Therefore, we need not consider Johnson's "spectrum efficiency" argument, because the issue of whether a more efficient use of spectrum would result from allotting Channel 263A to Andover while granting Johnson's upgrade is rendered moot by the fact that Channel 263A cannot be allotted.[10] In any event, the cases which Johnson cites in support of his spectrum efficiency and "private preference" claims are inapposite. None of those cases supports a conclusion that we should allot a channel of a lesser class than requested, absent an expression of interest in applying for that channel, in order to accommodate another party's allotment proposal. In addition, none of the cases cited involve a comparison between an upgrade proposal and a new allotment, as in this proceeding.[11]

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[9] Johnson references *Amendment of the Rules to Permit FM Radio Stations to Upgrade to Adjacent Superior Classes of Channels in Their Communities* (MM Docket No. 85-313), 51 Fed. Reg 20290 (June 4, 1986).

[10] Nor need we compare the gain areas that would result from a Class C3 allotment at Andover versus a Class A allotment to Andover and a Class C2 upgrade at Wellington. However, we note that the Commission generally undertakes "gain area" comparisons only when conflicting proposals have the same standing under the *Revision* priorities, and that such comparisons examine not only geographic service increases (the sole factor considered by Johnson), but also the net increases in population served by the proposals. *See Greenup, Kentucky and Athens, Ohio*, 2 FCC Rcd 4319, 4321 (1987), *aff'd in relevant part*, 4 FCC Rcd 3843, 3843 (1988), *aff'd in relevant part*, 6 FCC Rcd (1991); *appeal dismissed sub nom. WATH, Inc. v. FCC*, D.C. Cir. No. 91-1268 (Sept. 26, 1991).

[11] The *Endicott* and *Marshfield* decisions are inapplicable because they discuss the preclusive effect of allotments, a matter we no longer address. *See Revision*, 90 FCC 2d at 92-94. With respect to the private preference issue, none of the cases cited by Johnson stand for the proposition that a party's interest in a

10. Under the *Revision* priorities, the allotment of a first local transmission service is comparatively superior to either an additional service to a community or to an upgrade of existing service. Therefore Fricke's counterproposal to allot Channel 230C3 to Andover is preferable to either the Wichita allotment[12] or the Wellington upgrade.[13] Accordingly, we will: allot Channel 230C3 to Andover, Kansas, as that community's first local transmission service. Channel 230C3 can be allotted to Andover without imposition of a site restriction.[14]

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 0.283 of the Commission's Rules, IT IS HEREBY ORDERED, That effective **May 15, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Andover, Kansas	230C3

12. IT IS FURTHER ORDERED, That the petition for rule making filed by Johnson Enterprises, Inc., for Channel 230C2 at Wellington, Kansas (RM-6874) IS DENIED.

13. IT IS FURTHER ORDERED, That the counterproposal submitted by Willie Kendrick for Channel 231A at Wichita, Kansas (RM-7206) IS DENIED.

14. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Willie Kendrick IS DISMISSED as moot.

15. IT IS FURTHER ORDERED, That the counterproposal filed by Jonathan Fricke for Channel 230C3 at Andover, Kansas IS GRANTED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Belford V. Lawson, III, Mass Media Bureau, (202)632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

channel of a particular *class* is a mere private preference which, at our discretion, can be downgraded to a channel of a lower class.

[12] Therefore we need not reach Johnson's allegations concerning the technical shortcomings of Kendrick's proposal.

[13] While an upgrade may be preferred to a first local transmission service if the upgrade would provide a first or second local aural transmission service to an audience within its service area, *see, e.g., Bonita Springs et al., Florida*, 6 FCC Rcd 6966 (1991); *Benton, Arkansas*, 3 FCC Rcd 4840 (1988), no such showing has been made here.

[14] The coordinates of this allotment are 37-42-54 and 97-06-54. These are the reference coordinates for the city of Andover.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-59

In the Matter of

Amendment of Section 73.202(b), RM-7923
Table of Allotments,
FM Broadcast Stations.
(Bradenton, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 20, 1992; Released: March 31, 1992

Comment Date: May 22, 1992
Reply Comment Date: June 17, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Sunshine State Broadcasting Company, Inc. ("petitioner"), licensee of Station WDUV(FM), Bradenton, Florida, requesting the substitution of Channel 278C for Channel 277C at Bradenton, and the modification of Station WDUV(FM)'s license to specify Channel 278C. Petitioner states that it will apply for the channel, if allotted.

2. In support of its proposal petitioner submits that Station WDUV(FM) currently operates with 100 KW at 177 meters on Channel 277C. However, it is prevented from exceeding the minimum Class C HAAT of 300 meters due to Commission spacing restrictions and Federal Aviation Administration ("FAA") limitations. The proposed substitution of Channel 278C for Channel 277C at Bradenton will permit Station WDUV(FM) to locate in an area which will comply with all Commission and FAA restrictions on tall towers. Petitioner states it presently serves 1,620,000 persons at its existing facilities, whereas a HAAT of 457 meters from the proposed reference point will permit service to 2,274,000 persons.

3. We believe the public interest would be served by proposing the substitution of Channel 278C for Channel 277C at Bradenton, Florida. Channel 278C can be allotted to Bradenton in compliance with the Commission's minimum distance separation requirements with a site restriction of 41.7 kilometers (25.9 miles) northeast[1] in order to avoid short-spacing to a construction permit for Station WQOL(FM), Channel 279C2, Vero Beach, Florida. Channel 278C at Bradenton would be short-spaced to Channel 279C2, Station WXKB(FM), Cape Coral, Florida. However, Station WXKB was ordered in MM Docket No. 88-512 to specify operation on Channel 280C1. *See* 6 FCC Rcd 6966 (1991). Therefore, the grant of an authorization for Channel 278C at Bradenton, Florida, may be withheld until Station WXKB(FM) is licensed on Channel 280C1 at Cape Coral, Florida. We shall also propose to modify the license for Station WDUV(FM) at Bradenton to specify operation on Channel 278C in lieu of Channel 277C.

4. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Bradenton, Florida	277C	278C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 22, 1992,** and reply comments on or before **June 17, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

George R. Borsari, Jr.
Borsari & Paxson
2033 M Street, N.W., Suite 630
Washington, D.C. 20036
(Attorney for Sunshine State
Broadcasting Company, Inc.)

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Notice* to WRCC Partners, P.O. Box 189, Cape Coral, Florida 33910 (Licensee of Station WXKB(FM)).

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and

[1] The coordinates for Channel 278C at Bradenton are North Latitude 27-49-20 and West Longitude 82-21-50.

such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-60

In the Matter of

Amendment of Section 73.202(b), RM-7916
Table of Allotments,
FM Broadcast Stations.
(Yankeetown, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 20, 1992; Released: March 31, 1992

Comment Date: May 22, 1992
Reply Comment Date: June 17, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by William R. Lacy ("petitioner"), seeking the allotment of Channel 242A to Yankeetown, Florida, as that community's first local FM service. Petitioner states that he intends to apply for the channel, if allotted.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 242A to Yankeetown, Florida, as that community's first local FM channel. Yankeetown it is an incorporated community located in Levy County, with a 1990 U.S. Census population of 635. Channel 242A can be allotted to Yankeetown in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Yankeetown, Florida	--	242A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 22, 1992,** and reply comments on or before **June 17, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William R. Lacy
3507-A Van Tassel
Amarillo, Texas 79121
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Petitioner failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. Petitioner is requested to rectify this omission in his comments.

[2] The coordinates are North Latitude 29-01-47 and West Longitude 82-42-58.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

FAIR OAKS CELLULAR PARTNERS — File No. 10960-CL-P-549-A-88

For Facilities in the Domestic Public Cellular Radio Telecommunications System On Frequency Block A in Market No. 549, New Hampshire-2

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1992; Released: April 1, 1992

By the Chief, Mobile Services Division:

I. BACKGROUND

1. On January 29, 1992, the Commission issued a Public Notice, Mimeo No. 21449, announcing that the Commission would conduct lotteries on April 8, 1992, to select winning cellular radio applications in 29 Rural Service Areas (RSAs). In each of these markets, lotteries had been held previously, but the winning applications had been found defective under the Commission's rules and dismissed. One of the dismissed applicants was Fair Oaks Cellular Partners (Fair Oaks), whose application is captioned above. Fair Oaks' application was dismissed initially in *Butte Cellular Group*, 6 FCC Rcd 6745 (1991). Fair Oaks has filed a petition for reconsideration of that order. It now seeks to stay the non-wireline lottery for Market 549, pending final review of its petition for reconsideration.

2. Fair Oaks argues that the Commission erred in dismissing its application for failure to demonstrate that Cellular Equipment Management Service, Inc. (CEMS), its original financial source, was a financial arm of a capital equipment supplier with sufficient funds to support its commitment under Section 22.917(c)(5) of the rules. According to Fair Oaks, Commission rules do not require financial arms of capital equipment suppliers to demonstrate sufficient funds at the time of filing. Thus, it contends, even if the Commission determined that CEMS was not qualified, Fair Oaks should have been permitted to amend its application to substitute an alternative funding source.

3. Moreover, Fair Oaks states, in its petition for reconsideration that the adoption of Section 22.917(c) violated the Paperwork Reduction Act of 1980 (PRA) because the requirement that applicants have financing available "at the time of filing" was a substantial and material rule change made without the required review and approval by the Office of Management and Budget (OMB). In addition, Fair Oaks maintains that the order adopting the financial rules did not have a valid OMB control number. Fair Oaks argues that the Commission should stay the new lottery for the New Hampshire 2 RSA market until the Commission acts upon its petition for reconsideration.

4. Fair Oaks also maintains that all of the criteria for granting a stay of the New Hampshire 2 RSA lottery set out in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1977), are met. First, it contends that it is highly likely that it will prevail on the merits of its appeal because Section 22.917 lacked a valid OMB control number.[1] Second, Fair Oaks argues that it will suffer irreparable harm if the April 8, 1992 lottery is conducted because it will incur economic loss by having to expend funds to contest the award of an authorization to the new lottery winner. Third, Fair Oaks argues that no other interested parties will be substantially harmed by a stay of the new lottery because it would merely maintain the status quo with respect to a final determination of a license award. Fourth, Fair Oaks contends that a stay of the new lottery is in the public interest because a new lottery will result in additional and costly litigation and ultimately cause more delay in granting a permanent license.

II. DISCUSSION

5. Fair Oaks has failed to make a sufficient showing to justify the extraordinary relief it seeks. It has not shown that it will suffer irreparable injury if the lottery takes place as scheduled. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). ("It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm.") The lottery procedure neither constitutes, nor automatically results in, the grant of a construction permit. Rather, it initiates a process which will require some time before the issuance of a construction permit. Even after that process is completed, it is clear that other relief is available should the petitioner wish to challenge the grant of a construction authorization to a lottery winner by filing a petition for reconsideration or an application for review of the grant. *See Virginia Petroleum Jobbers Association*, *supra*. The courts have recognized that license grants which are challenged by litigation may be undone if the basis of the grant is reversed. *See, e.g., Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976). Moreover, in the public notice announcing the new lottery, the MSD stated that an authorization will be conditioned upon the Commission's action dismissing the application of the previous winner becoming final and no longer subject to judicial review. Accordingly, we conclude that Fair Oaks has failed to demonstrate that it will suffer irreparable harm, as is required for the grant of a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). We further note that granting a stay would harm the public in general and other interested parties because a delay of the lottery would deny expeditious service to the public if Fair Oaks' petition for reconsideration turns out to be unsuccessful.

6. Accordingly, IT IS ORDERED that the request for stay filed by Fair Oaks Cellular Partners (File No. 10960-CL-P-549-A-89) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Fair Oaks states that it will be impossible for the Commission to document its compliance with the PRA, given the indisputable fact that the Commission made substantive changes to both the "internal" and the "non-internal" funding portions of Section 22.917(c) without OMB approval.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

DIAL-A-PAGE, INC. File No. 163500-92-1-BFW

Notice of Apparent Liability for
Forfeiture Penalty for Station
KUC891 in the Public Land
Mobile Service at
Mt. Pleasant, Texas

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 19, 1992; Released: March 31, 1992

By the Commission:

1. On January 12, 1989, Dial-A-Page, Inc. (Dial) filed an application for authority to add a transmitting location to Station KUC891 to operate on frequency 152.24 MHz at Mt. Pleasant, Texas (Mt. Pleasant). Dial constructed the Mt. Pleasant station pursuant to Section 22.43(d) of the Commission's rules after a competing mutually exclusive application was dismissed by the Commission in October of 1990. Although Dial was permitted to commence construction of the transmitter, it was required to wait for Commission authorization to operate the transmitter. *See* Section 22.43(d). Notwithstanding, Dial began operating before receiving authorization. On April 2, 1991, an engineer of the Commission's Dallas, Texas Field Office who was inspecting Dial's antenna tower in the Mt. Pleasant area contacted Dial regarding operation of the facility because Dial had not been authorized to operate it.

2. Dial claims that it activated the transmitter on February 28, 1991, because of internal miscommunication. According to Dial, when a Dial officer informed a technician of assertedly imminent Commission action on Dial's application, the technician mistakenly thought he was given permission to activate the transmitter. Dial states that the transmitter was turned off on April 3, 1991, as a result of the Commission engineer's inquiry discovering the unauthorized operation. Dial further claims it has no subscribers in the Mt. Pleasant area, it has made no provision for local access to the system for callers, and it has not offered Mt. Pleasant service to its existing subcribers. Prior to the Commission engineer's bringing the matter of Dial's unauthorized Mt. Pleasant facility to the attention of the Commission's Mobile Services Division (MSD), the MSD, on April 4, 1991, granted Dial authority to construct facilities to operate on frequency 152.24 MHz at Mt. Pleasant.

3. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

In addition, Section 22.43(d)(6) of the Commission's rules states:

> *Commencing operation.* Applicants constructing facilities without prior Commission authorization pursuant to Section 22.43(d), shall not commence operating such facilities until after the Commission issues an authorization and the applicant complies with the notification requirements of Section 22.9(b)(1) of the rules.

Moreover, Section 22.9(b)(1) provides:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because the Commission did not issue Dial an authorization prior to Dial's commencement of operation, and Dial did not notify the Commission of commencement of operations, Dial is in apparent violation of Section 301 of the Communications Act and Sections 22.43(d)(6) and 22.9(b)(1) of the Commission's rules.

4. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
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> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or if any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that Dial's operation of the facility prior to April 4, 1991, constitutes willful and repeated conduct within the terms of the statute.

5. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), 56 Fed. Reg. 37665 (1991), *recon. pending*, the base forfeiture amount for operation at an unauthorized location is $40,000. Consistent with this *Policy Statement*, we are imposing this amount as the forfeiture. No adjustments appear appropriate. This amount was determined after consideration of the factors set forth in Section 503(b)(2)(D) of the Communications Act of 1934, as amended.

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that Dial-A-Page, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the

amount of Forty Thousand Dollars ($40,000) for willful and repeated violations of the aforementioned statutory and rule provisions prior to April 4, 1991.

7. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission, at: Federal Communications Commision, Post Office Box 73482, Chicago, IL 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Communications Services, Inc.,
Garey M Wallace Company, and
NTS Communications, Inc.
Complainants,

v. File No. E-91-158

Citizens Telephone Company,
Defendant.

ORDER

Adopted: March 23, 1992; Released: April 1, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Communications Services, Inc., Garey M Wallace Company and NTS Communications, Inc. (Complainants) filed the above-captioned complaint alleging that Defendant's rates during the period from January 1, 1987, to December 31, 1988, were unjust and unreasonable in violation of 47 U.S.C. § 201(b).

2. On January 21, 1992, the Complainants filed a Motion to Dismiss. The Motion to Dismiss states that the Complainants have discovered that they did not purchase interstate switched access service from the Defendant and, therefore, do not have a cause of action against the Defendant.

3. On the basis of the statements contained in the Motion, we grant the Complainants' dismissal request.

4. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 208 and authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Motion to Dismiss the above-captioned complaint IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

United Radio Group, Inc.
(Assignor)

and File No. BALH-910816HW

Duhamel Broadcasting
Enterprises
(Assignee)

For Assignment of License of
KEZV(FM), Spearfish, South Dakota

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1992; Released: March 18, 1992

By the Commission: Commissioner Barrett dissenting and issuing a statement.

1. The Commission has before it the above-captioned application for assignment of license of KEZV(FM), Spearfish, South Dakota, from United Radio Group, Inc. ("URG") to Duhamel Broadcasting Enterprises ("Duhamel") and the related request for permanent waiver of 47 C.F.R. §73.3555(b), the Commission's one-to-a-market rule. Absent such a waiver, Duhamel, licensee of both KOTA(AM) and VHF station KOTA-TV, [1] Rapid City, South Dakota (ranked 165th in Arbitron Area of Dominant Influence "ADI" TV markets) is barred from acquiring KEZV(FM) because of the Commission's prohibition on common ownership or control of radio and television stations serving the same principal community.[2] This application is unopposed.

2. Duhamel bases its request on the Commission's revised waiver standards adopted in *The Second Report and Order* in MM Docket No. 87-7 (*"Second Report and Order"*), 4 FCC Rcd 1741 (1989), *recon. denied in part and granted in part*, 4 FCC Rcd 6489 (1989). Under these criteria, the Commission presumptively favors waiver requests involving station combinations serving the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licenses or "voices" after the proposed combination. It also favors requests involving a "failed" station - *i.e.*, a station that has not been operational for a substantial period of time or that is involved in bankruptcy proceedings. While Duhamel admittedly does not meet the top 25 market/30 station standard, it contends that much of the Commission's rationale for granting such waivers applies to the Rapid City/Spearfish market. In particular, Duhamel states that, considering the size of the market, it is well served by the numerous broadcast facilities and other media outlets available to it. Duhamel also believes that financially troubled KEZV(FM) qualifies as a failed station. However, if the Commission disagrees with its evaluation, Duhamel seeks review of its waiver request under the case-by-case standard outlined in the *Second Report and Order*. Under this standard, the Commission examines waiver requests using various public interest criteria, including: (1) the potential benefits of joint operation of the facilities; (2) the types of facilities involved; (3) the number of media outlets already owned by the applicant in the relevant market; (4) any financial difficulties experienced by the stations involved; and (5) the nature of the relevant market in light of the Commission's diversity and competition concerns. These factors are then weighed to determine whether the potential benefits of combined facilities can be obtained without undermining the overall public interest.

3. Although Duhamel contends that it should receive a presumptive waiver under either the "top 25 markets/30 voices" or "failed" station standard, we decline to evaluate its request under those tests. On its face, the request meets neither of the two standards. Moreover, we have developed an appropriate case-by-case waiver process for cases outside the presumptive criteria, and there is no reason not to use that process here.

4. In support of its waiver request, Duhamel submits a lengthy and detailed showing which addresses each of the five case-by-case factors. While we have carefully examined each aspect of the showing, we will, for our purposes here, briefly discuss only those portions of the showing most germane to our final determination. Duhamel first contends that the proposed media combination will yield increased public service benefits, including economies of scale, cost savings, as well as programming and service benefits. Duhamel estimates that a savings of approximately $150,000 annually would result from the combined operation of KOTA(AM) and KEZV(FM) with KOTA-TV. These cost savings would result, in part, from the use of shared facilities and equipment. In particular, Duhamel proposes to establish an auxiliary studio for KEZV(FM) in Rapid City and colocate it with the existing combined studios of KOTA-TV and KOTA(AM). This will permit KEZV(FM) to share administrative and office space with the KOTA facility and thereby reduce the demands on and expenses of KEZV(FM)'s Spearfish studio. Combined operation would also allow KEZV(FM) to take full advantage of administrative and technical staff, advertising and promotional efficiencies, news gathering operations and the sales departments of the KOTA(AM) and KOTA-TV facilities. Additionally, relocation of the KEZV(FM) antenna, transmitter and translator[3] to KOTA sites would also result in great cost savings.

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[1] When the Commission first adopted the one-to-a-market rule in 1970, *Multiple Ownership of Standard, FM and TV B/cast Stations*, 22 FCC 2d 306 (1970), *reconsidered in part*, 28 FCC 2d 662 (1971), it grandfathered existing combinations such as KOTA(AM) and KOTA-TV, acquired by Duhamel in 1954 and 1955 respectively.

[2] The relevant contour (1 mV/m) of KEZV(FM) encompasses the entire community of Rapid City; however, the relevant contour of KOTA-TV (Grade A) does not encompass the community of Spearfish. In order for a proposed acquisition to be subject to the rule, only one of the relevant contours must encompass the other community of license.

[3] Also pending is an application (BALFT-910816HX) for the assignment of FM translator K276CQ from URG to Duhamel.

5. Duhamel further notes that combined operations would result in programming benefits by allowing KEZV(FM) access to the KOTA(AM) "full service" format and the news/information capabilities it provides. Access also would be provided to television personnel, including a meteorologist and a financial expert. Duhamel emphasizes that, except for the rare occasions when the same news, weather or public affairs programs are broadcast on the AM and FM simultaneously, the two stations would have separate programming, thus promoting continued diversity in the area. Finally, in terms of service benefits, Duhamel argues that approval of the proposed acquisition would ensure the continuation of programming by the only commercial station in Spearfish. Indeed, the cost savings realized from the operating efficiencies of such a combined operation would allow not only for continued service, but also would permit investment in upgraded and improved technical facilities.

6. Duhamel notes that, with respect to types of facilities involved, KOTA(AM) is a full-time 5 kW Class III facility with a restricted night-time directional pattern. KEZV(FM) is a 100 kW Class C station. KOTA-TV, in turn, is a VHF facility with 100,000 watts of power. KHSD-TV, operating with 316 kW from Lead-Deadwood, South Dakota, is a full-time satellite of KOTA-TV and has no employees but is serviced entirely from Rapid City. Duhamel contends that even though KOTA-TV is a VHF station, it is considered to be a small operation in a market such as Rapid City and is therefore comparable to UHF facilities in other markets.

7. With respect to the criterion concerning the number of other media outlets the applicant already owns in the relevant market, Duhamel argues that the proposed combination will not result in it holding an attributable interest in more than one AM and one FM station in the same metro area. Duhamel owns KOTA(AM) in Rapid City and is proposing to acquire KEZV(FM) in Spearfish.[4] Therefore, Duhamel concludes it will not have an attributable interest in more than one AM and one FM in the Rapid City metro area.

8. With regard to the criterion concerning the financial condition of KEZV(FM), Duhamel submits that KEZV(FM) closely resembles a failed station. Duhamel represents that KEZV(FM) began operation in July 1985 and has lost money and shown a negative cash flow every year since, based on URG tax returns filed annually with the Internal Revenue Service from 1985 through 1990. Using annualized figures drawn from URG's interim financial figures for the first half of the year through June 30, 1991, Duhamel states that KEZV(FM) will show a tax loss of $121,977 for 1991 and a negative cash flow of $118,146. The tax returns also indicate that the total liabilities of the station have increased every year, and the interim financial statements reflect that URG's total corporate liability is now at $663,516. Duhamel states that this liability exceeds the fair market value of the station and the prospect of the station's market value ever again exceeding station liabilities appears bleak. It is also submitted that, although the station has been offered publicly for sale for at least three years through three separate brokers and through individual contacts, Duhamel has made the only purchase offer for the station. Relying on a letter from URG, Duhamel further represents that URG is faced with closing down the station and going dark or declaring bankruptcy if the station is not sold. Additionally, Duhamel states that KOTA(AM) has lost money for the last eleven years and expects to continue to do so in the current fiscal year. KOTA(AM), according to Duhamel, along with a majority of all AM stations, is faced with declining audience ratings and revenues, and merger with an FM station may be the only way to halt continuing financial decline.

9. Duhamel turns next to the fifth and final criterion, involving the nature of the relevant market in light of the Commission's diversity and competition concerns. This factor includes an assessment of the number of broadcast outlets and separate "voices" that would exist if the merger were approved, the degree of cable penetration, and the availability of other non-broadcast media in the market. As to service provided by television stations, the Commission has stated that it will consider the relevant Arbitron Area of Dominant Influence ("ADI") TV market, and as to radio service, the relevant Arbitron TV metro market. *Second Report and Order*, 4 FCC Rcd at 1760, n. 101. Duhamel states that the Rapid City ADI (ranked 165th with 92,200 households) is served by a total of 46 broadcast outlets. There are eleven television stations in the Rapid City ADI including satellite and non-commercial stations and one station authorized but not yet built. Additionally, Duhamel represents that there are 13 AM stations and 22 FM stations serving the Rapid City ADI, as well as 8 daily newspapers and 38 weekly newspapers, shoppers and local magazines. Duhamel also states that every community in the ADI has cable and that average cable penetration is 59.2%, which is stated to be near the national average. Arbitron does not define a television metro market for Rapid City. However, according to Duhamel, if the Rapid City *radio* metro market is used, there are 4 television stations, 5 AM stations and 9 FM stations for a total of 18 broadcast stations in the 2 county metro with 40,600 television households. If the home county of KEZV(FM) is included as a county in the metro area, two satellite television stations are added to the total along with 5 AM and FM stations. Duhamel does not indicate in its showing how many of these stations are separately owned. Commission records reveal that of the 46 media outlets listed by Duhamel for the Rapid City ADI, there are 5 AM/FM combinations in that group. There are also 3 (1 TV and 2 FM) entities that are non-commercial and operated by the State Board of Directors for Educational TV. Duhamel itself owns another satellite television station, KSGW-TV, in Sheridan, Wyoming. Duhamel nonetheless submits that the market is very competitive and that the proposed combination of KOTA(AM) and KEZV(FM), along with KOTA-TV, will further increase competition in the market.

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[4] As previously noted, Duhamel owns KOTA(AM), as well as KOTA-TV, pursuant to a grandfathered exception to 47 C.F.R. §73.3555(b). In other cases, the Commission has allowed proposed acquisitions where entities already owned stations pursuant to grandfathering situations. *See Holston Valley*, 5 FCC Rcd 507 (1990). Even when grandfathering situations did not survive assignment or transfer, waivers have been granted to allow for common ownership of all stations involved. *See Great American Television and Radio Co., Inc.*, 4 FCC Rcd 6347 (1989).

10. In view of the totality of the information presented, we conclude that Duhamel's showing in support of a waiver of the one-to-a-market rule meets our public interest case-by-case criteria, and that a waiver in this instance will result in significant public service benefits without a substantial adverse impact on the level of diversity and competition in the local marketplace. Duhamel has shown that joint operation of the stations will result in significant cost savings and economic efficiencies that are critical to the continued operation of KEZV(FM); those savings and efficiencies will also benefit KOTA(AM) and KOTA-TV. Duhamel has also indicated that both programming and service benefits will result from the merger. In addition, Duhamel has presented evidence that KEZV(FM) is in severe financial distress. This six year old station has consistently lost money and shown a negative cash flow since it began operating. Total corporate liability now appears to exceed the fair market value of the station. Moreover, although the station has been on the market for three years, no one has offered to buy KEZV(FM) except Duhamel. Duhamel has further shown that KOTA(AM) has suffered financially, and that the addition of KEZV(FM) to the grandfathered KOTA(AM)/KOTA-TV combination will help strengthen the financial position of both KEZV(FM) and KOTA(AM). The Commission has in the past seen fit to grant waivers of the one-to-a-market rule in circumstances similar to those in the instant case. *See, e.g., Holston Valley*, 5 FCC Rcd 507 (1990); *Tulsa 23*, 5 FCC Rcd 727 (1990).

11. We are also persuaded that the AM/FM combination, coupled with KOTA-TV,[5] will not result in undue broadcast concentration by Duhamel in view of the number of broadcast facilities in both the Rapid City ADI and the two and three county metro market of Rapid City.[6] Examination of Commission records indicate that the number of operational television stations in the relevant ADI is 10, with 7 of those stations separately owned. In the two county *radio* metro market, there is a total of 11 operational radio stations, including KOTA(AM). An additional 5 radio stations are added, including KEZV(FM), if the home county of KEZV(FM) is considered as part of the metro area. Of these 16 radio stations, we approximate, from our records and the Arbitron radio market report submitted by Duhamel, that 13 are now separately owned. After the KEZV(FM) sale is finalized and KOTA(AM) and KEZV(FM) are commonly owned, 12 separate radio voices will exist. Also because of 2 existing radio and television combinations, the number of separate broadcast voices is further reduced. Overall, we estimate that a total of 26 broadcast stations in the market will be owned by a total of 17 separate owners. While the number of independent broadcast voices remaining in the Rapid City market after the proposed merger would not approach the 30 voices used in presumptive waiver cases, the applicant here, as in *Tulsa 23*,[7] has persuaded us that the reduction in diversity and competition resulting from grant of the subject application is outweighed by the demonstrated financial and service benefits to be achieved. Additionally, the degree of cable penetration and the availability of non-broadcast media in the relevant market also enhances the waiver request.

12. Accordingly, IT IS ORDERED, That the request for permanent waiver of the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(b), IS HEREBY GRANTED; and, upon finding the applicants fully qualified, the application (BALH-910816HW) for assignment of license of KEZV(FM) and the application (BALFT-910816HX) for assignment of FM translator K276CQ from United Radio Group, Inc. to Duhamel Broadcasting Enterprises ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[5] With respect to the types of facilities involved, we note that Duhamel's existing and proposed facilities are not insubstantial. There are, however, comparable competing technical facilities in its market. For example, KOTA-TV is a VHF (channel 3), network-affiliated (ABC) station authorized to operate with 100 kW of visual power at an antenna Height Above Average Terrain (HAAT) of 201 meters, while KEVN-TV, the NBC affiliate in Rapid City, operates with comparable VHF (channel 7) facilities (263 kW at HAAT of 204 meters). KCLO-TV, however, the CBS affiliate, is a UHF facility (channel 15) and has an appreciably smaller coverage area than either KOTA-TV or KEVN-TV. KOTA(AM) is a Class III facility operating with 5 kW day and night, and KEZV(FM), licensed to Spearfish, some 40 miles to the northwest of Rapid City, is a Class C station with 100 kW. Each of the four commercial FM stations licensed to Rapid City -- KGGG-FM, KKMK(FM), KIQK(FM) and KVSR(FM) -- operate as Class C1 facilities with 100 kW, and the licensees of three of these stations own and operate colocated AM stations.

[6] We are not persuaded by Duhamel's apparent suggestion that in evaluating the number of facilities owned by Duhamel under the third criterion of our waiver standard, we should disregard KEZV(FM) because it is not licensed to the Rapid City metro area, as are its TV and AM stations. While the distance between Rapid City and Spearfish may lessen to some extent the intensity of the competition and diversity concerns raised by Duhamel's proposed acquisition, there is no basis for excluding KEZV(FM) from consideration under this criterion.

[7] In *Tulsa 23*, grant of the requested waiver resulted in 31 broadcast stations owned by 24 separate owners in the Tulsa, Oklahoma market. *Tulsa 23*, 5 FCC Rcd at 729.

DISSENTING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

IN RE: KEZV(FM), Spearfish, South Dakota; One-to-a-market Waiver.

In 1989, the Commission adopted a revised one-to-a-market waiver standard for cases satisfying certain criteria ("Second Order").[1] Specifically, the Commission indicated that it would "look favorably" upon waiver applications involving radio and television station combinations in the top 25 television markets where there will be at least 30 separately owned, operated and controlled broadcast licensees or voices after the proposed merger. The Commission also stated that it would look with similar favor on waiver requests involving "failed" broadcast stations. Beyond these two circumstances, the Commission stated that it would consider waiver applications on a case-by-case basis. The case-by-case approach evaluates five public interest criteria: (1) the potential benefits of joint operation of the facilities; (2) the types of facilities involved [e.g., VHF or UHF, AM or FM]; (3) the number of media outlets already owned by the applicant in the relevant market; (4) any financial difficulties experienced by the stations involved; and (5) the nature of the market -- that is, the level of competition and diversity, based on both broadcast and other media voices, after the proposed merger is implemented.[2] The case-by-case approach evaluates whether the potential benefits of combined facilities can be obtained without undermining the public interest goals of diversity and economic competition in the local communications markets.

This Memorandum Opinion and Order ("Order") grants a one-to-a-market waiver to Duhamel Broadcasting Enterprises for the acquisition of KEZV(FM), Spearfish, South Dakota. While I have supported Commission authorization of one-to-a-market waivers in the past,[3] I continually have been concerned about the diversity and competitive implications of granting such waivers. Thus, I look very closely at these waiver cases, particularly where the facts presented do not satisfy either our top 25 television markets/30 broadcast voices test, or our failed broadcast station test. In this instance, the facts presented by Duhamel fail to meet either of these two tests. Thus, the case is evaluated under our case-by-case waiver standard. Under that case-by-case standard, I do not find that the balance of the facts in this case support the grant of a one-to-a-market waiver. I believe that the facts in this case raise concerns about the extent to which the Commission will limit the grant of one-to-a-market waivers; particularly where serious diversity and competitiveness issues are presented.[4]

The facts evaluated in this case raise several concerns. Of the five factors the Commission uses to evaluate case-by-case requests, two factors, the potential benefit of the joint operations of KEZV(FM) with KOTA(AM) and KOTA-TV, and the financial difficulties of KEZV(FM) and KOTA(AM), are cited as major justifications for waiver grant. While I do not doubt that operating efficiencies will be gained by allowing a merger in this case, I question the extent to which these factors alone should outweigh the other three case-by-case factors. Even assuming the efficiencies of a merger, I am not persuaded that the record evidence provides sufficient justification for waiver under the remaining case-by-case factors. Moreover, without passing the public interest test underlying these other criteria, the joint efficiency argument alone fails to provide assurance that diversity and competitiveness concerns have been offset.[5]

Two other factors evaluated in a case-by-case analysis are the types of facilities involved and the number of media outlets already owned by the applicant in the relevant market. The facilities presently operated by Duhamel, and being acquired by Duhamel, are all substantial in terms of power, coverage and size. Duhamel also operates a significant number of facilities in the Rapid City market. Presently, Duhamel owns KOTA-TV and KOTA(AM) in Rapid City, South Dakota. KOTA-TV is a VHF(channel 3), network-affiliated (ABC) station operating at 100 kW effective radiated power visual. This VHF station is carried on approximately 9 cable television systems serving about 24,000 subscribers.[6] KOTA(AM) is a Class III facility operating day and night at 5 kW. Duhamel owns these facilities in Rapid City under a grandfathering provision of the multiple ownership rules.[7] In addition to ownership of these facilities, Duhamel also

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[1] See, *Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989), *recon. denied in part and granted in part*, 4 FCC Rcd 6489 (1989) (Second Order).

[2] Id.

[3] See, e.g., *Midwest Communications, Inc.*, 7 FCC Rcd 159 (1991); *WHDH-AM, Inc.*, 6 FCC Rcd 4329 (1991); *Micronesia Broadcasting Corp.*, 6 FCC Rcd 984 (1991); and *Kyles Broadcasting, Ltd.*, 5 FCC Rcd 5846 (1990).

[4] This Order cites *Holston Valley*, 5 FCC Rcd 507 (1990) and *Tulsa 23*, 5 FCC Rcd 727 (1990) as precedent for granting case-by-case waivers in situations similar to Duhamel's request. However, a review of those cases indicates that the facts are different in significant areas. First, neither *Holston Valley* or *Tulsa 23* involved markets as small as Rapid City. Rapid City is the 163rd TV ADI and 243rd Metro Radio market. *Holston Valley* involved the 86th TV ADI and the 92nd Metro Radio market in the Bristol-Kingsport-Johnson City market. *Tulsa 23* involved the 54th TV ADI and the 60th Metro Radio market. Second, the number of voices remaining in the market were greater in *Holston Valley* and *Tulsa 23*. In both cases, over 30 voices remained in those markets after the mergers. Third, in one case the station experienced a prior bankruptcy [*Holston Valley*], and in *Tulsa 23*, the Commission stated that the station was operating "economically similar to a bankrupt station". In addition to the above factors, the type of broadcast facilities owned by Duhamel significantly increase my concern regarding the competitive impact of this waiver. See generally, *Kargo Broadcasting, Inc.* 5 FCC Rcd 3442 (1990) [Commission denies one-to-a-market waiver under case-by-case analysis due to diversity and competitiveness concerns. In particular, Bonneville International Corporation's media holdings in the relevant market raised significant concerns. The Salt Lake City market in that case was larger than the Rapid City market in this case. This Order was adopted by the Commission subsequent to the *Holston Valley* and *Tulsa 23* decisions.]

[5] See, *Kargo Broadcasting Inc.*, 5 FCC Rcd at 3443.

[6] See generally, Broadcasting Yearbook 1991.

[7] See, *Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 FCC 2d 306 (1970), *reconsidered in part*, 28 FCC 2d 662 (1971). Duhamel acquired KOTA(AM) and KOTA-TV in 1954 and 1955.

owns and operates two satellite TV stations in the Rapid City television ADI. Duhamel owns satellite station KSGW-TV, channel 12, in Sheridan, Wyoming. This satellite station operates at 316 kW [effective radiated power] visual at an antenna Height Above Average Terrain [HAAT] of 1216 feet.[8] The station is carried on approximately 5 cable systems serving about 10,000 subscribers.[9] Duhamel also is the licensee of KHSD-TV, channel 11, Lead-Deadwood, South Dakota; a full-time satellite of KOTA-TV. This satellite station has no employees and is serviced entirely from Rapid City. The station operates at 316 kW [effective radiated power] visual at an antenna HAAT of 1890 feet.[10] It is carried on approximately 12 cable systems with about 10,000 subscribers.[11]

With this Order, Duhamel now seeks to add a substantial FM radio facility, KEZV(FM), which is a class C facility operating at 100 kW and an antenna height of 1490 feet. In a separate proceeding, Duhamel also is seeking to acquire an FM translator from the current owners of KEZV(FM), which would operate with the combined facilities.[12] Thus, grant of this waiver will permit Duhamel to control 5 facilities in the Rapid City market, and possibly 6 facilities if the FM translator transfer is granted. In light of the substantial size and number of facilities that will be operated by Duhamel subsequent to grant of this one-to-a-market waiver, an examination of the nature of the market and potential impact on diversity is critical to this decision. In this regard, I find that this Order fails to adequately address diversity and competition concerns raised by the combination of the above factors and the market size involved.[13]

Under our final criteria of examining the nature of the market, Duhamel's waiver request presents serious diversity and competition issues. As stated above, Duhamel's request cannot be granted under our top 25 markets/30 separate voices test.[14] The Order cites 16 operational radio stations in a three-county radio metro area.[15] Of these 16 stations, 3 are educational stations. Subsequent to this waiver, of the 13 remaining *commercial* stations, 8 will be owned in AM-FM combinations. That leaves 5 separate commercial voices.[16] Duhamel will own two substantial commercial radio facilities [i.e. KOTA(AM) and KEZV(FM)] and possibly an FM translator.

On the TV side, it appears that 4 of the 10 stations in the Rapid City ADI are noncommercial.[17] Of the 6 remaining commercial stations, Duhamel owns and operates 3 stations: KOTATV, and larger satellite stations KHSD-TV and KSGW-TV. Of the 3 remaining commercial stations, two stations operate with common programming; KEVN-TV, channel 7, NBC affiliate and its satellite KIVV-TV, channel 5.[18] Given the combination of commercial voices, radio and TV, controlled by Duhamel subsequent to this waiver, I find that there are serious diversity concerns relative to the number of separately owned commercial voices remaining in the market.

In addition to the types and number of facilities owned by Duhamel, I am concerned about the manner in which this Order identifies the relevant market for purposes of counting the number of radio broadcast voices. In our *Second Order* we indicated that for "radio service", the Commission will consider the *relevant Arbitron TV metro market;* for TV service, the Commission considers the *Arbitron TV Area of Dominant Influence [ADI].* This Order states that Arbitron does not define a television metro market for Rapid City. In the absence of television metro market data, the Order cites three-county radio market statistics.[19] While I understand that this was a more conservative methodology than that presented by Duhamel, I am concerned that the Commission avoids any confusion in this area in future cases. The Commission must be careful not to allow waiver petitioners to unduly inflate the number of voices considered relevant to our one-to-a-market case-by-case analysis. Without clearer guidance from the Commission, I do not believe the figures cited in the Order are conservative enough.[20] Thus, in addition to the other factors cited above, I cannot support this waiver based on the potential for confusion where television metro market data is not available. There are not a sufficient number of separately owned broadcast voices remaining in the Rapid City market for me to feel that diversity is not impacted significantly. The cite to competing newspapers and cable systems does not alleviate my concern. Therefore, based on the type of broadcast facilities involved in this waiver request, the number of broadcast facilities already owned by Duhamel, and the

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[8] See generally, Broadcasting Yearbook 1991.

[9] Id.

[10] Id.

[11] Id.

[12] See Order at n.3.

[13] See generally, *Kargo Broadcasting Inc.*, 5 FCC Rcd at 3444.

[14] Rapid City is market 243 according to the Arbitron radio metro survey; it is 163 according to the Arbitron ADI TV survey. See generally, Broadcasting Yearbook 1991.

[15] See Order at ¶ 11.

[16] In contrast with the three-county method used in the Order, Broadcasting Yearbook lists 11 *commercial* radio stations in its Arbitron radio metro survey for Rapid City, S.D.; 8 of which will be owned as AM-FM combinations by 4 different owners subsequent to this waiver. See Broadcasting Yearbook 1991.

[17] See Order at ¶ 11. The four noncommercial stations are KZSD-TV, Martin, S. D., KBHE-TV, Rapid City, S.D., KPSD-TV, Eagle Butte, S.D. and KTNE-TV, Alliance, Nebraska. See Broadcasting Yearbook, 1991. According to Broadcasting Yearbook 1991, there appear to be 9 operational television stations in the Rapid City TV ADI, of which 7 are commercial TV stations. The Order [which cites 10 operational stations] utilizes Arbitron data provided by Duhamel to conduct its analysis.

[18] See, Broadcasting Yearbook 1991. At the time of this Order KRBQ-TV, Sheridan, Wyoming was not counted as an operational station. Thus, it is not included in the count of commercial stations.

[19] See Order at ¶ 11.

[20] See Order at ¶ 11. After looking at figures from the Broadcasting Yearbook for 1991, which lists radio stations rated by Arbitron [i.e. .5 or above], I would be more comfortable analyzing the relevant "radio service" market based on the number of "rated" stations in a market; particularly in the absence of television metro market data. In the absence of television metro data for the Rapid City market, this Order uses three-county radio figures to depict the relevant radio market. That data includes noncommercial radio stations. In this waiver context, I would have preferred a more conservative use of Rapid City radio metro data based on the latest ratings surveys for "commercial" stations. I hope the Commission will take this into consideration in future waiver cases. See generally, Broadcasting Yearbook 1991.

size of the relevant market, I find that diversity and competition in the Rapid City market could be significantly impacted.[21] Thus, I dissent from this waiver grant.

[21] In addition, in light of the recent Commission decision to allow radio ownership of up to 60 stations on a national level, and 3 to 6 stations at the local level, I question whether further regional concentrations of control will not evolve as the result of these one-to-a-market waivers and the new radio rules adopted by the majority. See, Public Notice announcing Action in MM Docket 91-140, March 12, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-181

In re Applications of

BARRY SKIDELSKY	File No. BPH-870819MO
BRADMARK BROADCASTING COMPANY	File No. BPH-870819MT
NORMANDY BROADCASTING CORPORATION	File No. BPH-870819NK

For a Construction Permit for
New FM Station, Channel 289B1,
Queensbury, New York

ORDER

Adopted: March 19, 1992; Released: April 2, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On February 5, 1992, the Review Board adopted a *Memorandum Opinion and Order*, 7 FCC Rcd 1392 (*MO&O*), denying a petition for reconsideration of its *Decision*, 7 FCC Rcd 1 (Rev. Bd. 1992), in this proceeding. Prior to the release of the MO&O, Barry Skidelsky filed on February 12, 1992, a petition for leave to amend, pursuant to 47 CFR § 1.65. The amendment reports the filing of an application to assign WUST(AM) from the District Group Communications, Inc. (DGC) to New World Radio, L.P. and a divestiture pledge by Skidelsky, who is the trustee in bankruptcy for DGC, in the event his application for the Construction Permit in the instant case is granted. No comments have been received concerning the petition; its acceptance involves no determination as to the effect to be given the amendment; and good cause has been shown.

2. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed February 12, 1992 by Barry Skidelsky IS GRANTED, and the amendment IS ACCEPTED for reporting purposes only.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPACT VIDEO SERVICES, INC. File No. I-T-C-92-029

Application for authority to establish channels of communications between the U.S. and INTELSAT satellites for the provision of international television service.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 24, 1992; Released: April 2, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above captioned application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international television service by Compact Video Services, Inc. (Compact Video).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-029 IS GRANTED, and Compact Video is authorized to establish channels of communication between the U.S. and INTELSAT satellites for the provision of international television service between the U.S. and the points listed in Comsat's tariff. Provided, however, Compact Video shall file applications pursuant to Title III of the Communications Act for any earth stations Compact Video plans to construct in order to provide the service authorized herein.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements for each of the countries to which it will provide service and copies of such agreements shall be filed with the Commission within 30 days of their execution.

4. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

5. IT IS FURTHER ORDERED that the applicant shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI INTERNATIONAL, INC. File No. CSG-91-035-P/L

Application for Authority to Construct and Operate a Third International Multipurpose Earth Station located at Pulantat, Guam

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 25, 1992; Released: April 2, 1992

By the Chief, International Facilities Division:

1. The Commission has under consideration an application filed on January 30, 1991 by MCI International, Inc. (MCII), a wholly-owned subsidiary of MCI Communications Corporation, pursuant to Sections 304, 308, and 309 of the Communications Act of 1934, as amended, Sections 102, 201 and 210 of the Communications Satellite Act of 1962, as amended, and the *Earth Station Modification Order*.[1] requesting authority to construct and operate a multipurpose INTELSAT Standard A international earth station at Pulantat, Guam. The application was placed on public notice on February 6, 1991. On February 29, 1991, the application was amended to make minor technical changes. On May 24, 1991, the Commission sent MCII a letter requesting clarifications of the technical portion of the application. On June 6, 1991, MCII made the necessary corrections.

2. On February 25, 1991, IT&E Overseas, Inc. (IT&E) filed an unopposed motion for extension of time until March 31 to respond to MCII's application. IT&E's motion was orally denied. On March 26, 1991, IT&E petitioned for leave to file late a petition to condition the authorization or deny MCII's application. IT&E's Petition to Condition Authorization or Deny Application was subsequently filed on April 3, 1991. MCII filed a Response to Petition to Condition or Deny Application and a Request for Immediate Conditional Grant on April 29, 1991. IT&E replied to MCII's response on May 17, 1991.

I. THE APPLICATION

3. MCII proposes to construct[2] and operate [3] a third earth station located at Pulantat, Guam to be utilized in conjunction with the INTELSAT Global Communications Satellite System for the provision of international service. The station will supplement international earth station facilities already located on Guam which are owned and operated by MCII through its subsidiary, Western Union International. It will enable MCII to diversify the routing patterns and restoration options available for its traffic.

4. The proposed earth station facility will employ Quadraphase Shift Keying (QPSK) to transmit and receive digital signals, and FDM/FM techniques to transmit and receive analog signals. The facility will handle traffic throughout the INTELSAT Pacific Ocean Region (POR). The station design will permit operation with any INTELSAT satellite serving the POR.

II. BACKGROUND

5. IT&E competes with MCII for the off-island long distance switched voice telephone market on Guam. There are no other significant competing providers of long distance service on Guam. MCII has been declared dominant by the Commission insofar as it serves Guam, and has a dominant market share.[4]

6. IT&E states that due to the dramatic growth and heavy demand for facilities on Guam, as well as the high risk of undersea cable failure, IT&E depends heavily on the flexibility of balancing its traffic between undersea cable and satellite facilities. Therefore, an integral part of its long distance service is carried over the Pacific INTELSAT system by purchasing individual Frequency Division Multiplex (FDM) and Compressed Frequency Division Multiplex (CFDM) analog satellite circuits from COMSAT. IT&E does not own an earth station, but instead must rely on MCII's Pulantat-2 facility for ground segment services.[5] Since the existing Pulantat-2 earth station, as presently equipped, is incapable of providing digital satellite access, MCII competes with IT&E over the same INTELSAT satellite using the same COMSAT analog-type circuits. Consequently, IT&E's and MCII's space segment costs are relatively equal.

7. IT&E states space segment unit costs per channel can be substantially reduced by purchasing COMSAT's International Digital Route Carrier (IDR) service. Because Pulantat-2 is not equipped for digital service, IT&E feels it is on an equal footing with MCII in regard to space segment costs. However, MCII's proposed Pulantat-3 earth station will have digital "QPSK" modulation capability, which is designed to make the station compatible with IDR. IT&E contends that it will be financially harmed and possibly unable to compete if MCII utilizes Comsat's IDR service on its new earth station, but denies IT&E access to it on a reasonable and equitable basis.[6]

8. IT&E alleges that MCII, in an unrelated proceeding, advised IT&E that IDR service will not be offered to IT&E, but will be reserved exclusively for MCII's use. Further, IT&E alleges that the only direct digital access to Pulantat from Guam's capital, Agana, is via a new fiber facility owned by the Guam Telephone Authority, which in turn has leased all available active capacity to MCII. Therefore, IT&E fears even if it is given access to IDR service on the earth station, it still will not be able to utilize it without also receiving access to MCII's fiber facility link to Agana.

9. As a result of these concerns, IT&E filed a petition against MCII's application asking the Commission to deny the application or place conditions upon its authorization. Specifically, IT&E petitions the Commission to condition MCII's application as follows:

(1) IT&E shall be offered an option to purchase at MCII's incremental cost plus no more than a reasonable markup an Indefeasible Right of Use (IRU) for at least 2.048 Mbps of IDR capacity on Pulantat-3; or, alternatively,

(2) IT&E shall be offered access to the same 2.048 Mbps of IDR earth segment capacity under reasonable contract or tariffed terms, and

(3) That IT&E be offered land access between Agana and the Pulantat earth station over MCII's facilities at terms equal to those which MCII charges itself or its subsidiaries.

10. MCII's response is that there is no Commission precedent to support IT&E's request for an IRU in the station, nor has IT&E made a showing of extraordinary need for one. Furthermore, MCII states that the issue concerning IT&E's alternate request, that MCII be required to offer IDR earth segment capacity under reasonable contract or tariffed terms, is premature and should be left to the Commission's complaint and tariff review processes if the need arises. In regard to whether IT&E will be offered land access via MCII's facilities between Agana and the Pulantat earth station, MCII states that this application is not the proper vehicle for addressing that issue.

III. DISCUSSION

11. For the following reasons, we will grant MCII's application, but with conditions. We generally agree with MCII's contention that the current Commission precedent and policy does not require a carrier to give an IRU to any other carrier requesting one. "The Commission generally views IRU conveyances as voluntary transactions between carriers owning facilities and other carriers seeking to acquire capacity in the facilities."[7] However, under Section 202(c)(2) of the Communications Satellite Act of 1962 (47 U.S.C. §712(c)(2)) the Commission is charged with ensuring that authorized carriers have nondiscriminatory use of, and equitable access to, satellite earth stations under just and reasonable charges.

12. Under normal circumstances, the issue of equitable access by other carriers is not presented in the context of an application to construct and operate an earth station. However, in light of the limited number of carriers and facilities on Guam, access to facilities of other carriers is a critical concern. Therefore, issues concerning access may be raised before a facility is applied for or is authorized.

13. In this case, IT&E has raised legitimate concerns that it will not be granted equitable access to MCII's Pulantat-3 earth station for use with IDR service. Further, MCII's response to IT&E's petition does little to allay our concerns. Therefore, we believe it is prudent in this situation to partially grant IT&E's petition and condition the authorization herein with the requirement that MCII provide access to IDR service on a tariffed, non-discriminatory basis to all authorized users under just and reasonable charges. Further, since MCII is dominant in its provision of multi-purpose earth station services, it will be required to provide cost support for its tariff filings, and IT&E and any other authorized user will have the opportunity to challenge the tariff rates as unlawful before the tariff becomes effective.[8]

IV. CONCLUSION/ORDERING CLAUSES

14. In conclusion, we find that the grant of MCII's application to construct and operate a third international multipurpose earth station located at Pulantat, Guam will serve the public interest, convenience and necessity. However, to ensure equitable access to Comsat's IDR service to other authorized users, we will place a condition on MCII's application that prior to commencing IDR service, for itself or others, it must file and have approved by the Commission a tariff for such service.

15. Accordingly, IT IS ORDERED, pursuant to Section 309 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-91-035-P/L IS GRANTED and MCII is authorized to construct and operate a third international multipurpose earth station located at Pulantat, Guam, subject to the condition that equitable access be provided to other carriers on a non-discriminatory basis.

16. IT IS FURTHER ORDERED that if MCII desires to provide IDR services via this station, it shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61.

17. IT IS FURTHER ORDERED that IT&E's petition to condition or deny application is GRANTED IN PART as outlined above.

18. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System, Report and Order, 100 FCC 2d 250 (1984)(*Earth Station Modification Order*).

[2] Subsequent to the filing of MCII's application, the Commission amended Section 25.113 to eliminate the requirement of a construction permit to construct a station of this type, effective June 27, 1991. *Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services*, 6 FCC Rcd 2806, 2809 and 2817 (1991). On July 2, 1991, MCII informed the Commission of its intention to undertake and complete construction by October 21, 1991.

[3] On October 1, 1991 MCII requested Special Temporary Authority to commence operations at the new earth station only so far as to replace services currently offered on its Pulantat-2 earth station. MCII's request was granted October 18, 1991.

[4] In the Matter of International Competitive Carrier Policies, Report and Order, 102 FCC 2d 812 (1985), *recon. denied*, FCC 86-339 (released July 29, 1986).

[5] IT&E states it has exhaustively explored the feasibility of constructing its own earth station, but the economics of such an undertaking, the imminence of new fiber opportunities, and IT&E's lower market share prevent IT&E from proceeding with such a plan from a prudent business perspective.

[6] IT&E states that with IDR earth station access it is possible to reduce space segment costs substantially by consolidating channels over high capacity digital IDR carrier services. Referring to a COMSAT promotional flyer, IT&E states that by consolidating 120 analog channels over 2.048 Mbs IDR service, the per channel unit space segment costs drop $248 per channel, or about 56%.

[7] *American Telephone and Telegraph Company*, 2 FCC Rcd 6635, 6638 (Com. Car. Bur. 1987).

[8] The concern raised by IT&E about land access between Pulantat and Agana is only tangentially related to this application. Therefore, we agree with MCII that this proceeding is not the proper place to address this issue.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Communications Satellite Corporation — File No. I-T-C-91-228

For authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to provide Inmarsat Standard A mobile satellite service in the Indian Ocean Region via coast earth station facilities in Turkiye and to acquire and operate associated leased line facilities

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 26, 1992; Released: April 2, 1992

By the Chief, International Facilities Division:

1. On September 27, 1991, Communications Satellite Corporation (Comsat), through its Comsat Mobile Communications division, filed the above-captioned application requesting authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978, 47 U.S.C. §§ 753(c), and Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to provide Inmarsat Standard A maritime and authorized international land mobile[1] satellite service in the Indian Ocean Region (IOR) through new Standard A coast earth station facilities near Ankara, Turkiye[2] and to acquire and operate a dedicated leased line interconnecting the Turkish facilities and Comsat's existing coast earth station in Southbury, Connecticut. Comsat states that because its IOR coast earth station will be located outside the United States, Comsat is not requesting authority under Title III of the Communications Act to construct and operate the subject coast earth station. The application was placed on public notice on October 9, 1991. No comments were received. For the reasons set forth below, we grant the application.

2. Comsat states that it has general authority to provide Standard A maritime services, and certain authority to provide international land mobile satellite services (LMSS) in the Atlantic Ocean Region-East (AOR-East) and Atlantic Ocean Region-West (AOR-West) through its coast earth station in Southbury, Connecticut, and in the Pacific Ocean Region (POR) through its coast earth station in Santa Paula, California. Comsat states that at present it has no coast earth station facilities in the IOR. It has an arrangement under which Kokusai Denshin Denwa (KDD), the Japanese Inmarsat signatory, provides Standard A shore-to-ship services to Comsat's IOR customers. However, Comsat states that certain of its competitors provide service on a global basis, both foreign signatories and IDB Aero-Nautical Communications, Inc. Comsat contends that it needs a truly global service in order to compete effectively. Thus, Comsat has entered into an agreement with the Turkish Inmarsat signatory for establishment of a Comsat Standard A facility at the same location as a Turkish Standard A coast earth station. According to Comsat, this will result in two independent Network Control Processors (NCPs) residing in the Turkish complex, each with its own Inmarsat IOR coast earth station identification number. Comsat's inbound and outbound traffic will be routed directly to and from Comsat's existing Southbury, Connecticut coast earth station by leased line. Comsat proposes to provide the full range of Comsat's currently authorized Standard A maritime and international land mobile services, including voice, telex and high-speed data services in the shore-to-ship and ship-to-shore directions between its existing voice switch in Southbury, Connecticut, and its existing telex switch in Washington, D.C.

3. Comsat states that many of its IOR customers, including the U.S. Navy, have asked Comsat to provide service to them directly in order to assure that they receive the same quality of service in the IOR as elsewhere and to enable them to attain economies associated with receiving service from a single provider and being billed in U.S. dollars. Comsat asserts that the U.S. Navy also has communications security concerns.

4. Comsat seeks authority to utilize the Inmarsat IOR satellites located at 64.5^{0}E.L. and at 66^{0}E.L. Comsat proposes to connect new baseband equipment including channel and control equipment with the existing Turkish coast earth station RF subsystem at a nominal 70 MHz. The Turkish coast earth station will employ the C-band transmit frequencies 6410.5-6443 MHz, and the C-band receive frequencies 4180-4200 MHz and 3600-3623 MHz. It will employ the L-band transmit frequencies 1626.5-1649.5 MHz and the L-band receive frequencies 1530-1548 MHz. Comsat maintains that these frequencies have been cleared previously.

5. The application states that the baseband equipment to be installed at the coast earth station is composed of two subsystems -- the channel equipment and the control equipment, which consists of switching equipment, signalling equipment and NCP equipment. According to the agreement that Comsat entered into with the Turkish signatory, the Turkish signatory will purchase the necessary coast earth station equipment from Comsat and lease the equipment back to Comsat. Comsat estimates the total cost of the Standard A NCP equipment to be approximately $750,000. Comsat will also pay the Turkish signatory for operation and maintenance of the facility, including 24 hour per day technical support by Comsat trained personnel. Comsat is responsible for paying all Inmarsat system charges associated with the establishment and operation of the Comsat facility in Turkiye. Comsat will lease the dedicated line between the new Turkish facility and Comsat's Southbury,Connecticut coast earth station at the tariffed charges of the Turkish signatory and the participating U.S. carrier. Comsat states that its existing rates for Standard A service will apply to service through the IOR facility.

6. Comsat says that provision of this service will serve the public interest by making Comsat's Standard A maritime and safety services, as well as international land mobile service, available to users in the IOR for the first

time. It will respond to specific customer requests, including the communications needs of the U.S. Navy. It will contribute to the safety of life and property on the high seas and on land and will promote the larger and more effective use of radio in the public interest. Comsat also contends that it will strengthen the U.S. competitive position in the provision of Inmarsat services by allowing Comsat to compete for a share of the IOR satellite traffic of customers that would otherwise use foreign signatories. Further, Comsat states that it will be able to provide this service in an economical manner and that this service will increase the traffic base over which Comsat's fixed costs are spread, producing additional revenues to the benefits of ratepayers.

7. We find that grant of this application will advance the Commission's general policy of enhancing competition in the provision of maritime communications services. It will serve the public interest, convenience and necessity because it will give customers more service options, and contribute to the safety of life and property. Moreover, Comsat promises that additional revenues will benefit ratepayers. In particular, it will promote effective U.S. competition with foreign signatories.

8. In File No. I-T-C-91-139, Comsat has requested blanket authority to provide international LMSS via the Inmarsat system and its regularly authorized coast earth stations. Because the issue of Inmarsat use for international LMSS will be considered in File No. I-T-C-91-139, we need not here address Comsat's request to provide Inmarsat Standard A LMSS through the Turkiye earth station. We therefore defer consideration of this issue to File No. I-T-C-91-139.

9. Accordingly, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 504(c) of the International Maritime Satellite Communications Act of 1978, 47 U.S.C. §§ 753(c), IT IS ORDERED that the application of Communications Satellite Corporation, Mobile Communications division, File No. I-T-C-91-228, IS GRANTED IN PART and Comsat is authorized to provide Inmarsat Standard A maritime mobile satellite services, including voice, telex, and high speed data, in the Indian Ocean Region through new Standard A coast earth station facilities near Ankara, Turkiye and to acquire and operate a dedicated leased line interconnecting the Turkish facilities and Comsat's existing coast earth station in Southbury, Connecticut.

10. IT IS FURTHER ORDERED that Comsat's request to provide international LMSS via the Turkiye coast earth station is deferred and will be considered in application File No. I-T-C-91-139.

11. The Commission retains jurisdiction over this matter to ensure the nondiscriminatory use of, and equitable access to, the Inmarsat satellite system.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for Reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In this application, Comsat requests authority to provide the Standard A maritime and international land mobile services for which it claims it already has been granted authority on a case-by-case basis. It also requests authority to provide any additional international land mobile services the Commission authorizes under the blanket authority requested in File No. I-T-C-91-139.

[2] According to Comsat, Turkiye is the official English spelling, recently approved by the Turkish government, of the name of the country formerly called Turkey.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

HUGHES COMMUNICATIONS GALAXY, INC. — File No. ITC-91-220

For Authority to Make Available Channels of Communication via the Galaxy V (W) Domestic Communications Satellite for Transmissions To and From Various Transborder Locations

ORDER AND AUTHORIZATION

Adopted: March 26, 1992; Released: April 2, 1992

By the Chief, International Facilities Division:

1. By the above-referenced application Hughes Communication Galaxy, Inc. (Hughes) requests authority under Section 214 of the Communications Act of 1934, as amended, to provide one-way and two-way transborder services between the U.S. and Mexico and the U.S. and Canada, and one-way services from the U.S. to Latin America and the Caribbean, over the Galaxy V (W) satellite system. The application was placed on public notice on September 25, 1991. No comments were received.

2. Hughes has been authorized to launch and operate its Galaxy V (W) satellite to replace the Westar V satellite at the 125 degree W.L. orbital location.[1] It now requests authority to utilize capacity on Galaxy V (W) for services identical to those previously authorized under the Commission's transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement.

3. We have previously recognized that where an application involves the extension of existing or planned domestic networks to provide video or business services between the United States and Canada and Mexico using U.S. domestic satellites, the grant of transborder authority is consistent with the Commission's Transborder policy.[2] In such cases we have determined that use of the INTELSAT system would be both clearly impractical and uneconomical.[3] We have also recognized that the same considerations apply to the distribution of video services which can be received on an incidental basis in transborder locations in Latin America and the Caribbean.[4]

4. We find that Hughes' request is in accord with current INTELSAT Article XIV(d) consultations,[5] and therefore will cause neither technical interference nor significant economic harm to the global system. Since all prerequisites for issuance of final authority have been met, we conclude that grant of the instant request will serve the public interest.

5. Accordingly, IT IS ORDERED that application File No. ITC-91-220 IS GRANTED, and Hughes is authorized to utilize transponder capacity on Galaxy V (W) for the provision of one-way and two-way services between the U.S. and Canada and Mexico, and one-way services between the U.S. and points in Latin America and the Caribbean.

6. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not dispense with any requirements that may be imposed by other countries involved.

7. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained or where the U.S. Government has determined that appropriate copyright protection does not otherwise exist.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *Hughes Communications Galaxy, Inc.*, 3 FCC Rcd 6989 (1988). The satellite was authorized as Westar VR, pursuant to application by Western Union to replace its Westar V satellite at the end of its useful life. After Western Union had submitted its application, but before Commission authorization, the Commission had approved the assignment of Western Union's satellite licenses to Hughes. *Western Union Corp.*, 3 FCC Rcd 6792 (1988). The Commission stated that Hughes was expected to launch its satellite into the orbital location assigned to Western Union. 3 FCC Rcd at 6990.

[2] *See* Transborder Satellite Video Services, 88 FCC 2d 258, 280 (1981) (*Transborder I*) (Duplication of services over INTELSAT would involve terrestrial links or multi-hop satellite connections, increase costs and result in an inefficient use of the available radio spectrum); Satellite Business Systems, 88 FCC 2d 195 (1981) (Commission authorized the provision of two-way business communications between the U.S. and Canada where the extension of an existing U.S. domestic network was involved).

[3] *Id.*

[4] *See, e.g.* Hughes Communications Galaxy Corp., 6 FCC Rcd 297 (1991); Hughes Communications Galaxy Corp., 3 FCC Rcd 7015 (1988); *Transborder I, supra.*

[5] Hughes has been granted permission to increase the power level of the Galaxy V-W satellite, from 10 to 16 watts. *See* Hughes Communications Galaxy, Inc., 5 FCC Rcd 1653 (1990). In providing the proposed transborder services, Hughes is required to maintain power levels consistent with the recent Article XIV(d) consultations contained in BG-82-52E, BG-82-69E and BG-82-79E (Rev. 1) (approving transborder services over Westar V and its replacement through 1999).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

SCS Communications File No. 13156-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on F-group Channels
at Salt Lake City, Utah

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1992; Released: April 2, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of SCS Communications, Inc. ("SCS") to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels to serve the Salt Lake City, Utah area was selected for qualification review as the result of a Commission lottery. U.S. Satellite Corporation, Inc. ("USSC") filed a post-lottery Petition to Deny, challenging the application. SCS filed an Opposition to the Petition.

2. *Pleadings.* In its Petition, USSC contends that SCS failed to submit FCC Form 430 (Common Carrier Radio Licensee Qualification Report) with the above-referenced application. SCS answered, in its Opposition, that both the application and Form 430 were submitted on the same day. In further pleadings, USSC alleges that SCS's failure to attach the Form 430 to the application constitutes a violation of Section 21.13, 47 C.F.R. § 21.13, of the Commission's rules.[1]

3. *Discussion.* In considering a petition to deny, we must first determine whether the petitioner has set forth specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity. 47 U.S.C. § 309(d)(1). If petitioner makes such a showing, the Commission must further determine whether petitioner presents a substantial and material question of fact based on the application, the pleadings filed, or other matters which the Commission may officially notice. 47 U.S.C. § 309(d)(2).[2]

4. USSC acknowledges that SCS's Salt Lake City application and its Form 430 were submitted on the same day. In that SCS did indeed submit Form 430 to the Commission as requested in the application (FCC Form 435), we find no violation of Section 21.13. Therefore, USSC's allegations alone, if assumed to be true, fail to establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Nor has USSC raised any substantial or material question of fact based on the record or in the pleadings filed.

5. *Ordering Clause.* Having carefully considered all the pleadings and the evidence submitted by the parties, we find that USSC's allegations are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petition to Deny filed by U.S. Satellite Corporation IS HEREBY DENIED.

6. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. Sec. 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. Sec. 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] USSC's Reply to Opposition to Petition to deny constitutes an unauthorized pleading pursuant to Section 1.825 of the rules. Nevertheless, we have considered the arguments presented therein.

[2] *See Mettler Communications, Inc.*, 6 FCC Rcd 7130.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

Universal Telecommunications Network, Inc. — File No. 14885-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on F-group Channels at New London-Norwich, CT

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1992; Released: April 2, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of Universal Telecommunications Network, Inc. ("Universal") to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels to serve the New London-Norwich, CT area was selected for qualification review as the result of a Commission lottery. Century Communications Corporation ("Century") filed a post-lottery Petition to Deny, challenging the application. Universal filed a Reply to the Petition.

2. *Pleadings.* In its Petition, Century contends that Universal failed to adequately demonstrate its financial qualifications to be an MMDS licensee in violation of Section 21.17 of the Commission's Rules, 47 C.F.R. Sec. 21.17. In response, Universal submits an updated financial statement. Universal disputes Century's contention that any update would constitute a major amendment under Section §21.23 of the Rules, 47 C.F.R. § 21.23, and would thus be untimely.

3. *Discussion.* The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. Sec. 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. Sec. 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985).

4. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). In the instant case, Century's alleges the apparent existence of a financial qualification violation. After consideration of Century's allegations we are persuaded that the asserted violations, standing alone, and, if assumed to be true, fail to sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. *See Jack G. Hubbard*, 5 FCC Rcd 1318 (Dom. Fac. Div. 1990); *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990); *Jody Barnes*, 3 FCC Rcd 5177 (Dom. Fac. Div. 1988).

5. With regard to Century's allegation that Universal failed to adequately demonstrate its financial qualifications pursuant to Section 21.17, we note that since Century's petition to deny was filed, the Commission revised Section 21.17 in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), to allow applicants to submit a financial certification of their ability to meet estimated construction costs and expenses of operating for a period of one year.[1] *Id.* at 5752-53 n.57. In view of the policy adopted by the Commission in that rulemaking order, Universal will be required to submit a financial certification.

6. *Ordering Clause.* Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Century's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petition to Deny filed by Century Communications Corporation IS HEREBY DENIED.

7. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. Sec. 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. Sec. 1.4(b)(2).

[1] It should be emphasized that the financial certification requirement does not abrogate the requirement that an applicant must demonstrate that it is financially qualified. The new Section 21.17 changes only the manner in which such demonstration is made.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-84

In re Applications of

RADIO REPRESENTATIVES, INC. File No. BPH-870910MD

KASA MOKU KA PAWA BROADCASTING, INC. File No. BPH-870910MZ

For Construction Permit for a
New FM Station on Channel 290C
in Honolulu, Hawaii

Appearances

Dan J. Alpert, on behalf of Radio Representatives, Inc.; *Paul A. Zevnik*, on behalf of Kasa Moku Ka Pawa Broadcasting, Inc. and *Y. Paulette Laden*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: March 27, 1992; Released: April 3, 1992

I. PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Kasa Moku Ka Pawa Broadcasting, Inc. ("KMKP") and Radio Representatives, Inc. (RRI) for a New FM station on channel 290C in Honolulu, Hawaii.[1]

2. By Hearing Designation Order (H.D.O), released in this proceeding on March 26, 1990 (DA 90-246), this proceeding was designated for hearing on the following issues:

> 1) To determine whether Sonrise Management Services, Inc., is an undisclosed real party-in-interest to Partnership's application.
>
> 2) To determine whether Partnership's organizational structure is a sham.
>
> 3) To determine whether Partnership violated Section 1.65 of the Commission's Rules and/or lacked candor, by failing to report the interest held by one of its partners in an application pending before the Commission.
>
> 4) To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Partnership possesses the basic qualifications to be a licensee of the facility sought herein.
>
> 5) If a final environmental impact statement is issued with respect to Radio, Folden, Mahalocolo, Kasa Moku, Yang, Hazen, La Kio and/or Partnership in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, As implemented by 47 C.F.R. Section 1.1301-1319.
>
> 6) To determine whether there is a reasonable possibility that the tower heights, locations and/or frequency proposed by the applicants in this proceeding would constitute a hazard to air navigation.
>
> 7) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 8) To determine in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

The H.D.O noted that data submitted by the applicants indicate that there would be a significant difference between the applicants in the size of the areas which would receive service from the proposals. Accordingly, it ruled that comparative coverage data would be considered in this proceeding under the standard comparative issue.

3. Issues 1, 2, 3 and 4, as set forth above are no longer pertinent to the resolution of this proceeding in view of the fact that Partnership's application was dismissed with prejudice by *Order*, FCC 90M-1504, released in this proceeding, on June 6, 1990. Similarly, issues 5 and 6 have been resolved favorably to the two applicants which remain in this proceeding. *See Orders*, FCC 92M-395, issued March 26, 1992 (KMKP), FCC 90M-2594, issued August 17, 1990 (RRI), FCC 92M-379, issued March 25, 1992 (KMKP) and FCC 92M-376, issued March 25,1992 (RRI).

4. By *Memorandum Opinion and Order* (FCC 90M-3523, released November 6, 1990, the Presiding Judge enlarged the issues in this proceeding to include the following:

> To determine whether the proposals of Radio Representatives, Inc., Gene A. Folden Broadcasting of Honolulu, Inc., Kasa Moku Ka Pawa Broadcasting, Inc., Jean Yang, and Pacific Tropical Broadcasting, Inc. will provide the coverage required by Section 73.315(a) of the Commission's Rules, and if not, whether evidence exists which would warrant a waiver.

The above set forth issue is still pending against RRI and KMKP. The other applicants against which the issue was designated have, as noted above, been dismissed with prejudice.

5. By *Memorandum Opinion and Order* (FCC 90M-3521), released November 6, 1990), the Presiding Judge added the following issues with respect to RRI:

> To determine the facts and circumstances surrounding the conviction of Norwood J. Patterson, a stockholder and the current President of RRI, for violation, in his operation of Commission licensed broadcast facilities, of federal laws pertaining to the withholding of employee's income taxes.

To determine, in light of the evidence adduced under the foregoing issues, the effect thereof on the basic qualifications of RRI to be a Commission licensee.

6. Prehearing conferences were held on June 4, 1990 and on December 10, 1990. Hearing sessions were held on April 29 and 30, and on May 1, and 2, 1991. Proposed Findings of Fact and Conclusions of Law were filed by KMKP and RRI and by the Commission's Mass Media Bureau, and these parties submitted reply statements.

Character Issue

7. Norwood Patterson who holds a 16 2/3 percent interest in RRI, was convicted in October, 1971 in the United States District Court For the Northern District of California of a misdemeanor. (RRI Ex. #5, at I; RRI Ex. #12, at I) He was convicted under Internal Revenue Service Code of 1954 (26 U.S.C. Section 7512(b) for failure to set up and make deposits within two days of the due date to a special United States trust fund. (RRI Ex. #5, at 2, RRI Ex. #12, at 4; Tr. 189, 191). The activities for which he was convicted occurred during a five month period of time, March - April and August - September 1968. (RRI Ex. 10, at 2). The total sum involved was $9,394.63 (RRI Exs. 10, and 11) Mr. Patterson was sentenced to five months incarceration and fined $499 on each of the counts. (RRI Ex. #5, at 2; KMKP Ex. #7, at 2-3) Mr. Patterson has been advised that the crimes for which he was convicted did not involve an element of wilfulness or intent and are not crimes involving moral turpitude or fraud (RRI Ex. #5, at 2).

8. As noted above, the actions which resulted in Mr. Patterson being convicted of a misdemeanor and sentenced to five months in prison occurred more than twenty years ago. Mr. Patterson testified that since that time he has taken steps to ensure that these violations never happen again. (Tr. 391; RRI Ex. #5, at 2). He now sees to it personally that all federal and state tax deposits are timely made (RRI Ex. #5, at 2).

9. Mr. Patterson has conceded his past guilt (Tr. 259), and there is no evidence of record that he has since that time, failed in any way to comply with the requirements of the Internal Revenue Code. Indeed, the record demonstrates that Mr. Patterson has taken steps to ensure that these violations do not reoccur, and he now sees to it personally that all federal and state tax deposits are made at the end of each payroll period. (RRI Ex. #5, at 2). In addition, during the forty plus years that Mr. Patterson has been involved in the communications business, no station in which he has been involved has even been fined for improper operations (RRI Ex. #5, at 2 - 3), and any citations issued for a violation by a broadcast facility in which he has been involved as a manager, owner or operator have always been minor and have been resolved with a letter of explanation. (RRI #5 at 3).

10. Since the misbehavior occurred, in excess of twenty years ago, Mr. Patterson has met all requirements of the Internal Revenue Code and has otherwise properly conducted himself as a licensee of this Commission. Although an attempt was made by both parties to relitigate the crimes with which Mr. Patterson was charged and ultimately convicted, the fact remains that they were misdemeanors which occurred many years ago, have not recurred, and did not involve an element of fraud, antitrust, unfair competition or discrimination. His conduct since that time demonstrates that he has rehabilitated himself. The record further shows that he has not been involved in any wrong doing since that time, and that he has taken positive steps to prevent the future occurrence of similar misconduct. The Presiding Judge concludes, therefore, that there is no valid basis for finding that these past infractions have any bearing on Mr. Patterson's suitability to be a Commission licensee. Accordingly, the character issue designated against RRI will be resolved in its favor, and RRI is found to be fully qualified to be a Commission licensee.

City Grade Coverage Issue

11. There is disagreement among the applicants as to the proper definition of the proposed city of license. RRI argues that for our purposes here the city of license should be considered as co-extensive with that portion of the island of Oahu referred to variously as the Judicial District, the Honolulu District and Honolulu by the United States Postal Service. The area is defined as that part of the island of Oahu from Moanalua to Maunalua, or the urban area of Honolulu, which includes downtown Honolulu and Waikiki, essentially that area styled as the Honolulu District (RRI Ex. #6, at Ex. G) Raymond R. Pau, the City Clerk of the city and county of Honolulu, states that the area described above is generally regarded as the city of Honolulu, Hawaii (RRI Ex. #6, at Ex. G), and Robert C. Schmitt, the State Statistician and Chief of the Statistics Branch in the Hawaii State Department of Business, Economic Development and Tourism, states that the city of Honolulu "for statistical purposes" remains coterminus with the Honolulu District (RRI Ex. #6, at Ex. N). KMKP urges the adoption of the legal definition of Honolulu which describes Honolulu, Hawaii as consisting of the entire island of Oahu and certain north western islands, all of which are under the jurisdiction of a single mayor and city council (KMKP Ex. #10, at 3). As will be made clear below, it matters not which definition is adopted, that is, the legal definition or the so-called "traditional" definition of Honolulu, Hawaii, since both applicants propose a broadcast service which meets the requirements of Section 73.315 (a) of the Commission rules.

12. Section 73.315 (a) of the Commission's Rules requires that all stations provide a minimum field strength of 70 dbu or (3.16 mV/m) or greater over the entire principal community to be served. Section 73.313 of the Commission's Rules sets forth the Commission's standard prediction methodology for determining whether or not the requirement has been met. All parties, including the Bureau, are in agreement that using the standard prediction methodology, both applicants' technical proposal will meet the requirements of Section 73.315 (a) of the Commission's Rules for a 70 dbu coverage of Honolulu, Hawaii (RRI Ex. #8, Ex G at 69; KMKP Ex. #11, at 7).

13. Although the Commission's standard prediction methodology set forth in that section, allows for terrain obstructions and the resulting shadowing, both applicants in responding to this issue, introduced a supplemental study from a selected engineer which is designed to adjust the coverage shown by the standard prediction method to account for terrain to a greater extent than is built into the aforementioned standard method.

14. RRI presented the testimony of Norwood R. Patterson, an engineer who is also a principal of RRI (Tr. 1018). Mr. Patterson used three separate methods for determining the coverage to be expected from the proposals taking terrain into account, and they are as follows: the FCC Commission's F (50, 50) curves; the Tech Note NBS 101 method; and, finally, a variation of the NBS 101 method, or the so-called grid file method. (RRI Ex. 8, at 5). KMKP's engineer, Mr. Bednarek, prepared his study at the request of all of the applicants, whose applications were still pending at the time, with the exception of RRI. He analyzed the signal propagation from what he considered to be the worst case proposal presented in this proceeding, using two methods which he claims are all sensitive to terrain. They are the free space less obstruction loss prediction method based on the method outlined in NBS technical note 101 and the adjusted F (50,50) which employs obstruction loss adjustments to the Commission's own F (50,50) curves. (KMKP Ex. 11,at 9-10). Rather than using eight evenly spaced radials and one through the community of license, RRI's study runs radials every two degrees, and KMKP's study runs radials at every degree. As the Bureau notes, RRI's study is, therefore, arguably more precise than the standard prediction method and Mr. Bednarek's even more precise; and that both studies are based on a standard of performance which greatly exceeds Commission requirements. However, the Bureau does not believe that the supplemental showings are any more reliable, noting that each study uses a different system of counting population which its opponent attacks as less accurate. It points out, correctly, that the only truly accurate measure of population is a head count which neither engineer has employed.

15. The Commission's rules require that an applicant need only demonstrate that it will provide a predicted 70 dbu signal to 50 percent of the locations within 80 percent of the community, 50 percent of the time. As the Bureau notes, using the various supplemental methods and definitions of the Honolulu, Hawaii community, the range is between 37 percent and 87 percent of the area and between 49 percent and 90 percent of the population, and most calculations show 70 dbu coverage in excess of 50 percent. Therefore, the standard prediction method which found each of the applicants in compliance with the city grade coverage rules is, in fact, validated by the supplemental showings. This fact in conjunction with the Bureau's position that the supplemental showings are not necessarily more reliable, accounts for the Bureau's position that both applicants are in substantial compliance with Section 73.315 of the Commission's Rules, regardless of which definition of Honolulu, Hawaii is used. The Bureau urges that the city grade coverage issue be resolved in the applicants' favor.

16. The Presiding Judge agrees with the Bureau that neither supplemental showing has invalidated the results of coverage predictions using the standard methods. The methods employed in the supplemental showings are more conservative than those advanced by the Commission and, according to the Bureau, count obstructions in some instances twice. The applicants attempt to more accurately assess the amount of population served is further flawed since neither applicant conducted a head count which is the only truly accurate measurement of the total population to be served. All parties are in agreement that the standard method for predicting coverage demonstrates that both applicants will meet the requirements of Section 73.315 of the Commission's rules, irrespective of the definition used for Honolulu, Hawaii. Accordingly, the city grade coverage issue designated against each of the applicants is resolved in their favor.

Standard Comparative Issue

Radio Representatives, Inc.

17. RRI is a California Corporation. G. Dawn Delgatty, who owns 33 1/3 percent of the voting stock, is Treasurer and serves on the Board of Directors. G. Dawn Patterson owns 16 2/3 percent of the voting stock in RRI and serves as Secretary and as a Director. Sherwood and Norwood Patterson each own 16 2/3 percent of RRI's voting stock, and the former is Vice President and a Director and the latter person, President and Director. Myrlin Patterson owns 16 2/3 of the voting stock. (RRI Exh. #I)

Diversification

18. RRI is the licensee of radio station KGDP (AM), Orcutt, California, and is the permittee of AM station KIDH, Eagle, Idaho. (RRI Ex. #3). It has also been granted a construction permit for a FM broadcast station to serve Orcutt, California on Channel 239BI subject to the outcome of the character issue designated in this proceeding. (RRI Ex. #3; Tr. 60; KMKP Ex. #8)

19. N. James Patterson, Jr. who resigned from RRI and divested his interest in RRI on January 23, 1989, see amendment dated February 3, 1989, is a 50 percent owner of station KIRV (AM), Fresno, California. (RRI Ex. #3)

20. Neither RRI nor any of its principals own any other interest in any medium of mass communications. (RRI Ex. #3)

Best Practicable Service

Integration

21. RRI does not propose to integrate its principals into the day-to-day operations of its proposed station at Honolulu, Hawaii. (RRI Ex. #2)

Auxiliary Power

22. RRI will install emergency power generating equipment at its transmitter site and studio in the event that its application is granted. (RRI Ex. #4).

Kasa Moku Ka Pawa Broadcasting, Inc.

23. KMKP is a corporation organized and existing under the laws of the State of Delaware. It is composed of two classes of stock: common voting stock; and non-voting common stock. Five thousand two hundred and fifty shares of common voting stock in KMKP have been subscribed[2] (KMKP Ex. #I) The ownership of KMKP is as follows: Edward F. Tilton, Jr. owns 62 percent of the common voting stock and Jacqueline Leilani Lindsey owns 38 percent of the common voting stock. Mr. Tilton is President, Secretary, Treasurer and a Director, and Ms. Lindsey is Vice-president and a Director. (KMKP Ex. #1)

Diversification

24. KMKP has no interest in any medium of mass communications, other than its application for the facility under consideration here. (KMKP Ex. #I, at 3). Similarly, Mr. Tilton and Ms. Lindsey hold no ownership interest in any medium of mass communications (KMKP Exs. #3 and 2). Ms. Lindsey has made a timely commitment to resign any and all positions with broadcast stations in the event that KMKP's application is granted.

Best Practicable Service

Integration

25. Edwin F. Tilton will serve as General Manager on a full time basis no less than forty hours a week, at KMKP's proposed station in Honolulu, Hawaii. As General Manager, Mr. Tilton will be responsible for the day-to-day supervision of all functions of the station, including programming, news, business, sales and engineering functions. In addition, he will assume responsibility for the day-to-day business and sales functions of the station and for the administration of KMKP's Equal Employment Opportunity Program. (KMKP Ex. #3)

26. Mr. Tilton has been a resident of Honolulu, Hawaii since 1982. He has been a member of the Hawaii Chamber of Commerce, located in Honolulu, from 1984 to the present, serving as a member of the Land Transportation Committee from August 1986 until August 1987. He was also a member of the Waikiki Improvement Association from 1985 to 1988. Mr. Tilton has been a member of the Retail Merchants Association of Hawaii since 1989. He has also served as a volunteer for the Women's Molokai to Oahu Canoe Race in 1989; the Bank of Hawaii Men's Molokai to Oahu Canoe Race, and for the Bank of Hawaii Kayak Challenge in 1988 and 1989; the Hula Halau Mohala Ilima - Merrie Monarch Hula Festival (1985 - 1989) and the Hula Halau Na Wai Eha O'Puna (1984 - 1986); and The Bishop Museum, Honolulu, Hawaii, in 1984 and 1985. From 1988 to the present, Mr. Tilton has been a participant in the Make-a-Wish Foundation of Honolulu (KMKP Ex. #3, at 2-3.)

27. Jacqueline Leilani Lindsey, a Native American female, proposes to serve as the station's Director of Programming and Community Affairs and as Operations Manager. She will work at the proposed station on a full-time basis, 40 or more hours a week. As Director of Programming and Community Affairs and Operations Manager, she will have direct management and supervisory authority over the programming, news, and engineering functions at the station. She will also supervise the on-air personalities, and she will be responsible for compliance with FCC rules and regulations, including all technical requirements. In addition, she will make all day-to-day programming decisions, with the exception of major format decisions, advertising and similar policy decisions, which will be made by the Board of Directors of KMKP (KMKP Ex. #2, at 1-2).

28. Ms. Lindsey has been a resident of Honolulu, Hawaii since 1968. She has indicated that she will continue to reside in Honolulu in the event that her application is granted. Since 1975, Ms. Lindsey has participated in activities associated with Aloha Week, a non-profit organization formed to promote good will. She also co-founded and has been involved in the Na Hoku Hanohano Awards from 1977 to the present. These awards are given to honor locally produced Hawaiian musicians and music, and she has been a member of the Hawaii Academy of Recording Arts, a non-profit organization which provides support for Hawaiian recording artists and industry since 1979 to the present, and she has been Vice-President and a member of the Board of Governors since 1980. Ms. Lindsey also participated in activities associated with the Honolulu March of Dimes from 1976 to 1980, and she has been a member since 1977 of two non-profit organizations dedicated to promoting native Hawaiian dance. In addition, she has been a volunteer supporter of the Office of Hawaiian Affairs from 1980 - 81 to the present, and she served as Mistress of Ceremonies at the annual fundraising concert in Honolulu, Hawaii for the Oahu Canoe Racing Association for the past five years. Ms. Lindsey has, since 1975, also volunteered her time to the following organizations: Kapialani Women's and Children's Medical Center; Alulike Board of Marketing and Advertising; Hawaii Visitors Bureau; Hawaii Library for the Blind; Hawaii Literacy Association; Easter Seals of Hawaii; American Cancer Society-Hawaii; and the Hawaii Lung Association. (KMKP Ex. 2,at 5-6).

29. Ms. Lindsey has been employed in broadcasting since 1972. She was an on-the-air personality with station KPOO-FM, San Francisco, California from 1972-73 and at Station KCCN, Honolulu, Hawaii from 1974 to 1981. She also worked, prior to 1975, as broadcast engineer, and from 1974-75 as Traffic Director at Station KHVH, Honolulu, Hawaii (KMKP Ex. #2, at 6-7). Ms. Lindsey also served as Program Director at Station KCCN, Honolulu, Hawaii from 1981 to 1984, and as Program Director and Station Manager at that station from 1984 to 1986. Ms. Lindsey was station manager of station KORL, Honolulu, Hawaii in 1986 and 1987, and from 1987 until 1990, she served as Promotion Director at station KQMQ, Honolulu, Hawaii. On April 9, 1990, Ms. Lindsey became Station Manager - Operations of KCCN-FM, Honolulu, Hawaii, and on April 1, 1991, She assumed additional responsibilities as Station Manager - Operations of KCCN (AM). Ms. Lindsey resigned her management level positions with KCCN(AM)-FM, Honolulu, Hawaii as of July 1, 1991. *See Order*, FCC 92M-380, issued March 25, 1992.

Auxiliary Power

30. KMKP will provide emergency power generating equipment at both its transmitter and studio locations. (KMKP Exh. #4).

Ultimate Conclusions

31. Since both applicants have been found qualified to be Commission licensees, the clear evidence is that KMKP, which alone among the two applicants proposes integration of ownership into management and is subject to no diversification demerit, is the superior applicant, and its application will be granted.

Rulings

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Kasa Moku Ka Pawa Broadcasting, Inc. (File No. BPH-

870910MZ) for authority to construct a new FM station or channel 290C in Honolulu, Hawaii IS GRANTED; and that the application of Radio Representatives, Inc. (File No. BPH-870910MD) IS DENIED.[3]

The grant of Kasa Moku Ka Pawa Broadcasting, Inc.'s application IS CONDITIONED as follows:

as set forth in the Federal Aviation Administration's Conditional Determination of No Hazard to Air Navigation dated July 23, 1991:

> 1. Kasa Moku will pay all expenses involved in the replacement of the frequency utilized for the LDA approach for Runway 26L at Honolulu International Airport and its commissioning.
>
> 2. Kasa Moku shall not commence construction of the tower until the modified LDA approach has been commissioned for use by the FAA.
>
> 3. If temporary construction equipment is used during the actual construction of the proposed tower and that equipment has a height that would exceed the notice standards of the Federal Aviation Regulations (FAR) Part 77, notice is submitted to the FAA's Western-Pacific Region, Los Angeles, California.
>
> 4. This decision is based solely on the foregoing description of the structure which includes location, height, ERP, and operating frequency. Notice must be given for any future construction or alteration that would exceed the above described height, increase the ERP, alter the transmitting frequency, and/or add other transmitting device(s). Compliance with this condition is in accordance with Section 77.13(a)(4) of the FAR.
>
> 5. The construction sponsor files supplemental notice with the FAA's Western-Pacific Region, Los Angeles, California, at the time the project is abandoned, or at least 48 hours before the start of construction, and 5 days after the structure reaches its greatest height.
>
> 6. The structure is marked and lighted in accordance with FAA Advisory Circular 70/7460-1G, Obstruction Marking and Lighting, Chapters 3, 4, 5, and 9.

and, as stated in the letter dated May 8, 1990 from W. Jan Gay, Assistant Chief, Audio Services Division, Mass Media Bureau:

> Warning signs which describe the radio frequency radiation hazard must be posted at appropriate intervals. Measures must be taken so that persons who are authorized access to the site are not exposed to levels in excess of the American National Standards Institute Guidelines (OST Bulletin No. 65, October 1985).

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTES

[1] The applications of Gene A. Folden Broadcasting of Honolulu, Inc., Wahalocolo Ltd., Daniel and Denise Lamaute, La Kio O Ka Po'e Hawaii Nei, Jean Yang, John Dean and Zoe Hazen d/b/a Hazen Communications, Santee Broadcasting, Inc. Honolulu, FM Limited Partnership, and Pacific Tropical Broadcasting, Inc's for the New FM facility in Honolulu, Hawaii were dismissed with prejudice. (see Orders . . . . John Dean and Zoe Hazen d/b/a Hazen Communications -- FCC 90M-877, released April 20, 1990; Santee Broadcasting, Inc. -- FCC 90M-1027, released May 2, 1990; Mahalocolo, Ltd., Daniel and Denise Lamaute, La Kio O Ka Po'e Hawaii Nei, and Honolulu FM Limited Partnership -- FCC 90M-1504, released June 6, 1990; Gene A. Folden Broadcasting of Honolulu, Inc. -- FCC 90M-3908, released December 12, 1990; Jean Yang and Pacific Tropical Broadcasting, Inc. -- FCC 91M-2361, released August 1, 1991)

[2] No non-voting common stock has been issued or subscribed. Gene A. Folden Broadcasting of Honolulu Inc. has agreed to purchase at least 3,892, but not more than 7,500, shares of non-voting common stock of KMKP, in return for the dismissal with prejudice of its application. (KMKP Ex. #1)

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-293

In re Applications of

MARGARET ESCRIVA File No. BPH-871124MG

For a Construction Permit for a
New FM Station on Channel 223A
in Topeka, Kansas

Appearances

Meredith S. Senter, Jr. and *Stephen D. Baruch*, on behalf of Margaret Escriva; and *James Shook*, on behalf of the Chief, Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: March 30, 1992; Released: April 3, 1992

PRELIMINARY STATEMENT

1. This proceeding, involving the application of Margaret Escriva (Escriva) for a new FM station on Channel 223A at Topeka, Kansas, is on remand by the Review Board.[1] *Margaret Escriva*, 6 FCC Rcd 4455 (Rev. Bd.) (*Remand Order*), *recon. dismissed*, 6 FCC Rcd 5391 (Rev. Bd. 1991) (*Reconsideration Order*).

2. In the *Remand Order*, the Board added the following issues against Escriva:

> 1. To determine whether Escriva could rely upon the assets of William Cordell for the loan necessary to be financially qualified for a broadcast construction permit; and
>
> 2. To determine, in light of the above, whether Escriva was financially qualified in February 1988 when she so amended her application.

Remand Order, 6 FCC Rcd at 4458 (footnote omitted).

3. The Board identified three specific factual matters for exploration under these issues. First, the Review Board questioned whether William Cordell intended to sell the rooftop management business of Spectrum Engineering Company (Spectrum), his sole proprietorship, in February 1988 in order to finance Mr. Cordell's then-pending application for a new FM station in Abilene, Texas, and to meet his agreement to loan $185,000 to Ms. Escriva for the construction of her Topeka station. *Remand Order*, 6 FCC Rcd at 4457. Second, the Review Board required Escriva to submit an independent appraisal of the market value of the rooftop management business. *Remand Order*, 6 FCC Rcd at 4457-4458. Third, the Board raised a question about the availability of approximately $115,000 in Mr. Cordell's bank accounts (including the bank accounts of Spectrum, his sole proprietorship) as of January 31, 1988. *Id.* at 4458. Ms. Escriva was assigned both the burdens of proceeding and proof. *Id.* at 4458; *Reconsideration Order*, 6 FCC Rcd at 5392.

4. Prehearing conferences relating to the added issues were held on August 13, 1991 and October 16, 1991. A hearing on the issues added by the Review Board commenced on November 14, 1991 and concluded on November 15, 1991, at which time the record was closed. Transcript (Tr.) at 1048; *Order*, FCC 91M-3298 (Admin. L. Judge, released November 19, 1991). Proposed findings of fact and conclusions were filed December 16, 1991; replies were filed December 30, 1991.

Findings of Fact

William Cordell's Intention To Sell His Rooftop Management Business In February 1988

5. The Review Board's first question is whether Mr. Cordell actually intended to sell the rooftop management business in February 1988 in order to finance the Abilene station, if he obtained it, and make the $185,000 loan to Ms. Escriva. In testimony on remand, Mr. Cordell denied having ever stated that in February 1988 he intended to sell his rooftop management business in order to finance the Abilene station and fund his agreement to loan $185,000 to Ms. Escriva. Mr. Cordell reiterated his previous testimony that he "was willing to sell Spectrum Engineering [the rooftop management business] to Mr. Shaffer for $250,000 in order to meet [his] financial commitment." He affirmed that, in February 1988, he was willing to sell the rooftop management business for $250,000 if necessary to meet his financial commitment. (Escriva Ex. 14 at ¶ 4).

6. Mr. Cordell distinguished between his willingness to sell the business, if necessary, and whether he actually intended to sell the business for $250,000. He testified that he intended to fund his commitment out of his ordinary income, rather than through the liquidation, pledge or other utilization of specific assets. He noted that his agreement with Ms. Escriva calls for him to provide funds in stages (for procurement of construction permit, construction of station, and working capital) that could extend over several years; Mr. Cordell is not obligated to provide all of the loan proceeds at one time. (Escriva Ex. 14 at ¶ 6; Escriva Ex. 2 at 17, Schedule B). Mr. Cordell believed that the same incremental approach would probably have also applied with respect to the funding of his Abilene station. (Escriva Ex. 14 at ¶ 6). Mr. Cordell expected that he would not, in all likelihood, have been required to come up with all of the money necessary to fund both commitments at one time. (Escriva Ex. 14 at ¶¶ 6, 7). Therefore, it may have been absolutely unnecessary for him to sell his business in order to fund his commitments. (Escriva Ex. 14 at ¶ 6).

7. Mr. Cordell has met all of his commitments under the February 1988 loan agreement with Ms. Escriva. He has been able to fund these commitments out of his income from his employment and his business. (Escriva Ex. 14 at ¶ 17).

8. When Mr. Cordell supplied Ms. Escriva with his personal financial statement as of January 31, 1988, it was his understanding that the purpose of supplying the finan-

cial statement was to demonstrate that he had the ability to meet his commitment to her (and to fund his Abilene station). Mr. Cordell testified that it was never his understanding that by supplying the financial statement he was making a representation that he intended to liquidate the assets on that balance sheet, and that he was never informed of any such requirement. He testified that he was never told that he actually had to show the precise cash or other assets that he intended to use to fund his commitment to Ms. Escriva (Escriva Ex. 14 at ¶ 9).

9. Mr. Cordell's understanding was that he was required to show that he had the capability to fund his commitment. In other words, his understanding was that he had to have cash and liquidatable assets net of liabilities sufficient to fund his obligations. It was his view then and it is his view now that he had and still has the capability, and he has in fact met every single obligation to Ms. Escriva. (Escriva Ex. 14 at ¶ 9).

10. Mr. Cordell testified that, in February 1988, he was willing to sell the rooftop management business. He said that he would not have entered into extensive negotiations with Shaffer & Associates if he were not willing to sell the business, nor would he have involved his lawyer and accountant in the negotiations if a sale were not contemplated. (Escriva Ex. 14 at ¶ 12; Tr. 914-917).

11. Mr. Cordell said that the reason that he ultimately did not sell the business was, very simply, that he and Mr. Shaffer were unable to agree upon all of the terms. (Escriva Ex. 14 at ¶ 12). Mr. Cordell's belief at the time was that the business was worth considerably more than $250,000. (Escriva Ex. 14 at ¶ 11; Tr. 914). Mr. Cordell testified that he would not have sold Spectrum's rooftop management business for a price he did not consider to be high enough unless it was necessary to meet his commitments. (Escriva Ex. 14 at ¶ 6).

12. Mr. Cordell testified that he has never failed to meet a financial commitment to another person, nor defaulted on any loan or on any other obligation, and that he has no intent to do so with regard to his commitment to Ms. Escriva. (Escriva Ex. 14 at ¶ 18).

13. Ms. Escriva testified that there has been absolutely no change in her actual plan as to how she would acquire the necessary $185,000 to fund her application. She has always intended to borrow it from Mr. Cordell. She and Mr. Cordell have a loan agreement that obligates him to provide her with funds. (Escriva Ex. 13 at ¶ 3).

14. Ms. Escriva testified that the only context in which the value of Mr. Cordell's rooftop management business has arisen in this proceeding was in connection with a financial statement dated as of January 31, 1988, that Mr. Cordell provided to her in February 1988 and that she relied upon in certifying her financial qualifications in her application. As she understood it at the time, the purpose of providing her with the financial statement was to demonstrate that Mr. Cordell had the ability to meet his commitment to her. (Escriva Ex. 13 at ¶ 5).

15. Ms. Escriva has never stated that the $185,000 that Mr. Cordell agreed to lend her would come from the sale of the rooftop management business. (Escriva Ex. 13 at ¶ 4). She testified that it was never her understanding that the purpose of the financial statement was to demonstrate the actual source of funds that Mr. Cordell would use, or that the statement actually committed Mr. Cordell to sell specific assets in order to provide the funds. Moreover, Mr. Cordell never represented to her that he was going to sell his rooftop management business in order to fund his loan commitment to her. (Escriva Ex. 13 at ¶ 5).

The Appraised Value Of The Rooftop Management Business Of Spectrum Engineering Company As Of January 31, 1988

16. Escriva introduced a report entitled "Appraisal of the Fair Market Value of the Rooftop Leasing Business of Spectrum Engineering Company, Houston, Texas, As Of January 31, 1988." The report was prepared by Timothy S. Pecaro of the firm Harrison, Bond & Pecaro. (Excriva Ex. 16). In the report and at the hearing, Mr. Pecaro expressed the opinion that the fair market value of the business was approximately $440,000 as of January 31, 1988. (*Id.* at 5, Tr. 1006).

17. Mr. Pecaro's expert qualifications were established at the hearing. He has been an appraiser since 1980, and has conducted over 1,000 appraisals, either personally or under his supervision. (Tr. 927-928). Since 1981, Mr. Pecaro has had extensive experience in the antenna space rental business. He described this experience in depth. (Tr. 929-935). He has previously conducted valuations of rooftop or site management businesses like Spectrum's. (Tr. 934). He testified that he is very familiar with the site management industry in general, and that there are only a handful of people that have the amount of information that he does on all of the sites of the major markets and site managers. (*Id.*).

18. SpaceCom introduced a critique of Mr. Pecaro's report. The critique was prepared and sponsored by Frank J. Higney of the firm BIA Consulting. (SpaceCom Ex. 3). Mr. Higney does not have any expertise in appraising site management businesses. He has never appraised a rooftop or site management business. (Tr. 1009, 1012). He did not know the name of the top five site management businesses in terms of size, and was not familiar with the company Shaffer & Associates. (Tr. 1012).[2] He does not have any experience or knowledge about the stability of relationships between management companies and building owners or towers owners. (Tr. 1013-1014). He has never done any work with buildings or tower owners with regard to their agreements with site management companies. (Tr. 1014).

19. The critique prepared by Mr. Higney does not purport to be an appraisal. (Tr. 1015). Mr. Higney did not conduct an appraisal of the business. (Tr. 1017, 1018). An appraisal would have entailed a number of investigatory steps and analyses which Mr. Highney did not conduct. (Tr. 1040-1044). Mr. Higney could have conducted an appraisal of Spectrum site management business, but someone at SpaceCom decided that he would not. (Tr. 1040).[3]

20. Mr. Higney agreed with the basic approach used by Mr. Pecaro in conducting his valuation of Spectrum's site management business. This approach is called the "discounted cash flow" approach. (Tr. 1024-1025).

21. The discounted cash flow method requires some judgments as to the future operating performance of a business in terms of revenues and expenses. Certain growth rates and expense increases over time must be assumed. The amount of the expenses assumed obviously will affect the amount of projected operating cash flow. If

an after-tax method is used, then judgments must also be made about the appropriate tax rate. (Tr. 937-938, 940-941).

22. Further assumptions must be made about the appropriate discount rate. The discount rate is used to establish the present value of the projected future cash flows and the residual value for the business at the end of the projections. The discount rate takes into consideration the time value of money (the fact that a dollar today is worth more than a dollar in five years, because interest could have been earned on the dollar in the interim period), and also the risk of the investment. (Tr. 938-939, 940-941, 948-950).

23. Mr. Higney disagreed with three assumptions made by Mr. Pecaro: (1) the projected future expenses of the business, in particular, the omission of an expense item for a full-time manager; (2) Mr. Pecaro's use of after-tax rather than pre-tax cash flow; and (3) the discount rate that Mr. Pecaro used. (Tr. 1025-1026). The criticisms are each discussed below.

Expense of a Full-Time Manager

24. Mr. Higney's assumption that projected future expenses should include a full-time manager's salary had a significant effect on his critique of Mr. Pecaro's appraisal. It resulted in a reduction of the cumulative present value of discounted cash flow for the period 1988 through 1992 from $200,848 to $63,307. (*Compare* SpaceCom Ex. 3 at 13 to Escriva Ex. 19 (memorandum from Frank Higney showing effect of assumption).) The assumption that an expense for a full-time manager should be included also affected the residual value of the business. (Tr. 1034-1035).

25. In deciding that an expense should be allocated for a full-time manager, Mr. Higney took into consideration events that occurred long after January 31, 1988 (the date of Mr. Pecaro's appraisal). Specifically, Mr. Higney relied on the fact that Mr. Cordell subsequently left his full-time job at the Rusk Corporation in order to spend full time on his own businesses. As of the appraisal date, January 31, 1988, however, Mr. Cordell was employed full time at Rusk Corporation and not with his rooftop leasing business. (Tr. 1029).

26. Mr. Cordell had an opportunity to review Mr. Higney's critique. He testified that the business did not require a full-time manager, and that in 1987, he in fact spent an average of only 6-8 hours a week managing the business. (Tr. 851). He described in great detail his typical management responsibilities at that time, which was prior to the subsequent significant expansion of the business later in 1988. (Tr. 851-853, 860-862, 898-903). Mr. Cordell also pointed out that the most logical buyer for his business would be an existing company already in the business such as Shaffer & Associates, Meridian Communications or Motorola. (Tr. 847). If one of those companies were to acquire the business, the purchaser's incremental cost of operating it would be negligible. (*Id.*) For example, Mr. Cordell pointed out that Shaffer & Associates could have folded the business into its existing operations. (Tr. 898). He also noted that Mr. Higney had overstated the cost of a manager even on a full-time basis. In Mr. Cordell's estimation, a buyer like Motorola would be able to cover the management functions provided by Mr. Cordell at an incremental cost of about $3,000. (Tr. 848).

27. Mr. Pecaro testified that he spent a considerable amount of time talking with Mr. Cordell about how the business was operated and the amount of time he spent on the business. He pointed out that Mr. Cordell managed the business on a part-time basis. (Tr. 955). Mr. Pecaro noted that the financial history of the business for the years 1985-1987 had included expenses for various independent contractors and other labor. One of his assumptions was that a typical buyer would have the personnel and the facilities in place to provide the part-time management functions that had been previously provided by Mr. Cordell, at very little incremental cost. (Tr. 955-956). Mr. Higney agreed that it was fair to make an assumption that a buyer would bring in competent management. For instance, Mr. Higney stated that in valuing a bankrupt business, he assumed that the buyer would have competent management. (Tr. 1039-1040, 1042).

28. Notwithstanding that Mr. Cordell and Mr. Pecaro believe that no adjustment in projected expenses is necessary, Escriva's counsel asked Mr. Pecaro to adjust his assumptions to include an expense for a person to replace Mr. Cordell, based upon Mr. Cordell's testimony about the amount of time he spent managing the business. (T. 957). Mr. Pecaro indicated that he believed that expenses would increase about $10,000 to $12,000 a year if a buyer had to pay for this service, using Mr. Higney's assumptions regarding the average salaries in the Houston area in 1988. (Tr. 957-958). Mr. Pecaro indicated that this additional expense would reduce his valuation of the business by 10 to 15 percent. (Tr. 958-959).

Pre-Tax Versus After-Tax Cash Flow

29. Mr. Higney stated that his criticism of the use of after-tax rather than pre-tax cash flow was not significant. (Tr. 1026).

30. In Mr. Pecaro's view, the use of the after-tax methodology is more conservative than the use of the pre-tax methodology. Mr. Pecaro believes that using the pre-tax methodology overstates cash flow, because it fails to recognize potential taxes on the business. Both Mr. Pecaro and Mr. Higney generally use the after-tax cash flow method. (Tr. 941, 971). Mr. Pecaro generally assumes that a purchaser will be a "C" corporation, which is a corporation taxed at the corporate level, rather than an "S" corporation, where the operating profits of the business pass through to the individuals for tax purposes. Mr. Pecaro assumes that the purchaser will be a C corporation because the effective tax rates for C corporations are higher than for individuals. Thus, the assumption is the more conservative one. (Tr. 941-942).

31. To demonstrate the conservativeness of using after-tax rather than pre-tax cash flow, Mr. Pecaro recalculated his valuation of the business using the pre-tax method. Using the pre-tax method and Mr. Pecaro's assumptions regarding the appropriate discount rate and expenses, Mr. Pecaro's valuation would have been $659,210. Using the pre-tax method, and including an appropriate expenses for a manager, his valuation would have been $585,379. (Tr. 1000).

The Appropriate Discount Rate

32. Mr. Higney also felt that the discount rate used by Mr. Pecaro was too low. Mr. Higney suggested a discount rate of 34 percent on a pre-tax basis, whereas Mr. Pecaro used a discount rate of 11.75 percent on an after-tax basis. The difference between the two discount rates is not actually 22.5 percent, however, because one is pre-tax and one is after-tax. (Tr. 1036).

33. Mr. Higney obtained the discount rate of 34 percent from a source known as Schilt's Risk Premiums. (SpaceCom Ex. 3 at 12-13). But of the over 500 appraisals that Mr. Higney has conducted, he has only used Schilt's Risk Premiums three or four times in determining the appropriate discount rate. (Tr. 1026-1037). He uses Schilt's as a source for the discount rate when he is valuing businesses that he is not very familiar with. (Tr. 1037).

34. Moreover, Mr. Higney assumed the highest degree of risk possible using Schilt's Risk Premiums. (SpaceCom Ex. 3 at Ex. 1). He placed Spectrum's site management business in Schilt's Category Five, which describes "small 'one man' businesses of a personal services nature, where the transferability of the income stream is in question." (*Id.*). One of the reasons that he assumed such a high degree of risk was based on his assumption of the potential for price competition. (Tr. 1038). The price competition between site management companies such as Spectrum's is on the basis of the commissions that they charge to buildings or their management. (*Id.*). Although Mr. Higney assumed the potential for price competition, he did not compare the rates charged by Mr. Cordell in 1988 to the rates charged by other management companies. He did not know the rates charged by other management companies. (Tr. 1039).

35. If Mr. Higney had been asked to appraise the value of a bankrup UHF television station in 1988, he would have used an after-tax discount rate of 18 percent, versus the pre-tax discount rate of 34 percent he assumed for Spectrum. He noted that his firm generally uses after-tax rather than pre-tax cash flow, notwithstanding his critique of Mr. Pecaro's report. (Tr. 1039). Mr. Higney agreed that the method that Mr. Pecaro used to arrive at a discount rate, which was referred to as the "prime plus method," is one of the "checks" generally accepted in the appraisal business for determining a discount rate. (Tr. 1035).

36. Mr. Pecaro testified that of the over 1,000 appraisals he had conducted, he has never used Schilt's Risk Premiums. Mr. Pecaro said that he had never seen a report that uses Schilt's Risk Premiums. (Tr. 953-954).

37. Mr. Pecaro testified as to how he accounted for the level of risk. He said that based on his experience, he found the site management business to be a fairly stable business, and that Spectrum's business had enjoyed increased revenues over time. He added that he used a lower discount rate because he assumed a low growth rate in the first instance. He noted that there is a relationship between the level of risk assumed in the discount rate and the growth rate assumed. For example, if projected operating cash flow assumed a very high growth rate, then he would have used a higher risk discount. But because he assumed a low growth rate, he felt that use of a lower discount rate was warranted. (Tr. 949-950, 981-982).

38. For example, Mr. Pecaro did not assume any growth in the number of sites under management. He merely assumed that there would be an increase in revenue as leases came up for renewal, and that there would likely be some additional demand for space at the sites that he had under management. (Tr. 950). This assumption was very conservative, because in fact the business had added sites over time, and in January 1988 Mr. Cordell was in negotiations for a number of additional sites. (Tr. 951). (In fact, the business had been growing at the rate of 25 percent a year in 1988, but Mr. Pecaro assumed future growth of only 5 percent per year. (Tr. 975)).

39. Mr. Pecaro felt that the assumption that the existing leases would continue was justified, because they had been in existence for a number of years prior to 1988, and the buyer was assumed to have competent management. Furthermore, the rates that Mr. Cordell charged were already among the lowest that Mr. Pecaro had ever seen, so he did not believe that they were very vulnerable to price competition. (Tr. 951-952). Unlike Mr. Higney, Mr. Pecaro was able to testify extensively on cross-examination about the risks he assessed in determining the discount rate. (Tr. 974-975, 990-995). Thus, he concluded that the business did not justify a high discount rate because it was not a high risk business. (Tr. 986).

40. Mr. Cordell also testified about the stability of the business. He has operated the site management business over 10 years and today manages 35 towers and rooftops. He has never lost a site or had a site management agreement terminated by the building owner. (Tr. 849-850).

41. Furthermore, Spectrum's site management business was already a significant business in 1988, not a newly established enterprise. Mr. Pecaro testified that he had previously encountered Spectrum during the course of preparing reports on the industry in general, and that Spectrum was already dominant in Houston in 1988 because it controlled two of the primary sites there. (Tr. 935). Mr. Cordell testified that Spectrum was already the largest site or rooftop management business in Houston in 1988 (Tr. 858).

The Amount Of Net Liquid Assets And The Net Worth Of William Cordell, As Reported In the Audited Financial Statement Of William Cordell As Of January 31, 1988

42. To demonstrate the availability to Mr. Cordell of $115,000 in cash in February 1988, Escriva introduced an audited statement of Mr. Cordell's financial condition as of January 31, 1988, which was prepared by Mr. Robert U. St. Jean, a certified public accountant. (Escriva Ex. 14 at ¶ 16).

43. The audit performed by Mr. St. Jean revealed the following differences between the compilation and the audit reports of Mr. Cordell's financial condition as of January 31, 1988:

a. Cash increased by $48,350, due to prior specification of incorrect reconciliation dates, the omission of certificates of deposit that Mr. Cordell's mother had given as gifts to Mr. Cordell, the prior exclusion of contributions to an employer's thrift plan, and various reconciling items.

b. Receivables, which were aged and certified collectible within 90 days by Mr. St. Jean, increased by $10,306, due to uncollected January 1988 billings for Spectrum.

c. Investments increased by $55,400, due to Mr. Cordell's prior under-estimation of the value of marketable securities, his omission of the liquidation amount of an investment that had been sold in a prior year, and his non-listing of a Krugerrand.

d. Life insurance with a cash value of $1,858 had not been listed previously.

e. Mr. Cordell has not previously listed various and sundry equipment, a boat, and automobiles that he owned, all of which had a value of $120,526.

f. The value of Mr. Cordell's residences decreased by $18,550 (from $161,450 on the compilation to $142,900 on the audit), as the result of discussions with realtors.

g. Personal effects with a value of $5,115 had been overlooked during the preparation of the compilation.

h. Accounts payable to rooftop owners of $35,110 were identified following the discovery of bookkeeping errors.

i. The amount of Mr. Cordell's income taxes payable increased by $15,005. As of the date the compilation was prepared Mr. Cordell's individual tax return had not been prepared, and there was no knowledge of any additional liability.

j. The amount of income taxes on unrealized appreciation increased by $16,030 (from $90,200 on the compilation to $106,230 on the audit), as there were additional unrealized gains.

(Escriva Ex. 15 at ¶¶ 2, 3(a)-(h), Attachment; Escriva Ex. 14 at ¶ 15; Escriva Ex. 6 at Attachment B; Tr. 831).

44. On the basis of the audit, which was prepared in accordance with the procedures specified in the "Personal Financial Statements Guide" as of December 31, 1990, published by the American Institute of Certified Public Accountants, Mr. St. Jean determined that Mr. Cordell had the following net liquid assets totalling $246,346:

Cash	$164,100
Accounts Receivable	10,306
Note Receivable	30,000
Investment in Common Stock and Other Marketable Securities	46,906
Cash Held in Bank Account of 100% Owned Company	9,960
Krugerrand	457
Vested Interest in Qualified Retirement Plans	**35,891**
	297,620
Less: Accounts Payable	35,110
Personal Credit	223
Income Taxes	15,005
Current Portion of Mortgage	**936**
	51,274
Total Net Liquid Assets	**$246,346**

(Escriva Ex. 15 at ¶ 5).

45. With respect specifically to the $164,100 in cash that was listed on the audited statement, Mr. Cordell testified the money was both real, and entirely his. It was all in Mr. Cordell's personal accounts, and he was free to draw upon the money and use it for any purpose at any time. There were no legal restrictions on the personal use of the money in January 1988, none of the funds were held in escrow accounts, and none of the funds were held in trusts. (Escriva Ex. 14 at ¶ 13; Tr. 893). The fact that at least one of Mr. Cordell's bank accounts was, in January 1988, in the name of Spectrum does not change the personal nature of the funds; the taxpayer identification number on the proprietorship's account is Mr. Cordell's Social Security number. (Escriva Ex. 14 at ¶ 13).

46. When the $246,346 in net liquid assets is added to the $250,000 net liquidable value of Spectrum's rooftop leasing business, the total of Mr. Cordell's net liquid and liquidable assets as of January 31, 1988, as revealed in the audited statement of Mr. Cordell's financial condition, was nearly $500,000. This total compares with the total of $448,550 that was based on the results of the compilation report as of the same date. (Escriva Ex. 15 at ¶ 15; Escriva Ex. 6 at ¶¶ :9-13).

47. In addition Mr. St. Jean determined, on the basis of his audit of Mr. Cordell's personal finances, that Mr. Cordell's net worth as of January 31, 1988 was $603,620. This figure is nearly $200,000 higher than the figure that was stated in the compilation report for the same date. (Escriva Ex. 15 at ¶ 2 and Attachment, p. 2; Escriva Ex. 6 at Attachment B, p. 2).

CONCLUSIONS

48. The Review Board remanded this proceeding for additional hearings on three factual matters related to Ms. Escriva's certification of her financial qualifications in February 1988. Specifically, the Review Board questioned: (1) whether William Cordell, who had agreed to lend Ms. Escriva $185,000, intended to sell the rooftop management business of Spectrum Engineering Company to meet both his loan commitment to Ms. Escriva and to provide $165,000 in funds for his then-pending proposal to construct a new FM station at Abilene, Texas; (2) whether the rooftop management business had an appraised value in excess of $250,000 (the amount claimed by Mr. Cordell and credited by the Presiding Judge) in February 1988;

and (3) whether the $115,000 in cash that was claimed to be in Mr. Cordell's bank accounts as of January 31, 1988 was, in fact, available to Mr. Cordell.

49. All three inquiries are resolved in Escriva's favor. First, the record establishes that when Mr. Cordell agreed to loan Margaret Escriva up to $185,000 in February 1988, he intended to take whatever steps were required for him to fund both the Escriva loan and his own proposal to provide $165,000 in funds to construct an FM station at Abilene, Texas. Mr. Cordell's agreement with Ms. Escriva called for him to provide funds in stages (for procurement of construction permit, construction of station, and working capital). Mr. Cordell planned to fund these advances from his income and Cordell has in fact been utilizing his assets to make advances to Ms. Escriva under the February 1988 Escriva/Cordell loan agreement. The record makes clear, however, that Mr. Cordell was willing to sell his rooftop management business if necessary to fulfill his commitment. Cordell's uncontroverted willingness to sell the business, if necessary, is legally sufficient for purposes of demonstrating Ms. Escriva's financial qualifications. *See Luis Prado Martorell*, 7 FCC 2d 73, 9 RR 2d 509 (Rev. Bd. 1967); see also *Lorain Community Broadcasting Co.*, 13 FCC 2d 106, 118 (Rev. Bd.), *recon. denied*, 14 FCC 2d 604 (Rev. Bd.), *rehearing dismissed*, 15 FCC 2d 388 (Rev. Bd. 1968), *review denied*, 18 FCC 2d 686 (1969), *aff'd sub nom. Allied Broadcasting, Inc. v. FCC*, 435 F.2d 68 D.C. Cir. 1970). In *Lorain Community*, the Board stated that "a principal who commits himself to lend money need not specifically state that his assets will be used to meet his commitment." *Lorain Community Broadcasting*, 13 FCC 2d at 118 (citing *Martorell*, 9 RR 2d at 517).

50. Next, the appraisal that was conducted by Mr. Pecaro of Spectrum Engineering Company's rooftop leasing business as of January 31, 1988 reveals that the business had a value of approximately $440,000. SpaceCom failed to offer a counterappraisal, and the critique performed by Mr. Higney contained several erroneous factual and methodological assumptions. Ms. Escriva has made the showing of value that the Commission requires.

51. Finally, the audit performed by Mr. Cordell's certified public accountant reveals that the cash held by Mr. Cordell was not $115,000, as believed on the basis of the compilation statement, but instead was $164,100. Moreover, the audit proved that the amount of accounts payable from Mr. Cordell and Spectrum to the owners of the rooftops managed by Spectrum was only $35,110, leaving a minimum "net" cash figure of nearly $130,000. Mr. Cordell's net worth increased by nearly 50 percent, from $410,000 to over $600,000.

52. In sum, Mr. Cordell is entitled to be credited with $164,000 in cash, and net liquid assets (exclusive of the value of Spectrum's rooftop leasing business) of $246,346. When the $250,000 value originally claimed for Spectrum's rooftop leasing business is added, Mr. Cordell possessed net liquid and liquidable assets of $496,346 to meet commitments of $165,000 for Abilene and $185,000 for Ms. Escriva. The cushion is a comfortable $146,000. When Spectrum's rooftop leasing business is valued at its fair market value of $440,000 or so, Mr. Cordell's cushion of net liquid and liquidable assets over commitments increases to nearly $340,000. On the basis of the record, it is concluded that Escriva was financially qualified at the time she so certified in her application.

Accordingly, IT IS ORDERED, That unless an appeal from this Supplementary Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules,[4] the grant of the application of Margaret Escriva IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] SpaceCom, Inc., the other applicant in this proceeding, dismissed its application pursuant to a settlement agreement approved by the Presiding Judge. *See MO&O, FCC 92M-365, released March 24, 1992.*

[2] According to Mr. Pecaro, Shaffer & Associates, which offered to buy Spectrum's business in 1988, is one of the major site managers. Others include Motorola, Broadcast Services Inc., Meridian, Sigma, and Lodestar Management. (Tr. 935).

[3] SpaceCom was offered the opportunity either to join with Escriva in submitting a joint, independent appraisal or to retain its own appraiser, but chose to do neither. (Tr. 1022).

[4] In the event exceptions are not filed within 30 days after the release of this Supplementary Initial Decision, and the Commission does not review the case on its own motion, this Supplementary Initial Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

R. J. WINTER, INC. File No. BPH-891012NB

For Construction Permit
for a New FM Station on Channel 267A
in Essex, New York

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 1992; Released: April 3, 1992

By the Commission:

1. The Commission has under consideration: (1) an "Application for Review" filed on April 22, 1991 by R. J. Winter, Inc. ("Winter"), an applicant for a construction permit for a new FM broadcast station at Essex, New York; (2) an opposition thereto filed on August 22, 1991 by mutually exclusive applicant WSMK Enterprises, Limited Partnership ("WSMK");[1] and (3) Winter's reply filed on September 19, 1991.[2] Previously, by letter dated March 13, 1991, the Chief, FM Branch, Mass Media Bureau ("Bureau"), acting by delegated authority, dismissed Winter's application, pursuant to 47 C.F.R. § 73.3564(a), as inadvertently accepted for tender, because Winter had certified in its application as originally filed that it was not financially qualified. Winter now seeks Commission review of the Bureau's dismissal of its application. We deny the application for review for the reasons set forth below.

BACKGROUND

2. On October 12, 1989, the closing date for the appropriate filing window for Channel 267A at Essex, the Winter application and four other mutually exclusive applications were filed. Section III of the application for construction permit (FCC Form 301, June 1989 version) requires the applicant to certify whether "sufficient net liquid assets are on hand or. . . sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." Winter certified "No" to this question and further indicated that it had only $75,000 in funds available to meet its estimated costs of $250,000 for construction and initial operation. Thereafter, on January 29, 1990, the last date in this proceeding for filing "amendments-as-of-right" to cure defects which would render the application unacceptable for filing, Winters filed an amendment which, *inter alia*, provided a "Yes" certification to its financial qualifications. Subsequently, on March 13, 1991, the Bureau, citing *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853, 3859-3860 & n.71 (1989) (*"Revision Order"*), dismissed the Winter application pursuant to 47 C.F.R. § 73.3564(a) because Winter's original negative financial certification rendered the application unacceptable for tender as of the close of the filing window for the Essex allotment.

3. In its application for review, Winter argues that the staff's dismissal of its FM application was erroneous and that the Commission should therefore reinstate the application *nunc pro tunc*. Specifically, it contends that: (1) the Commission provided inadequate public notice that a negative financial certification would be treated as a tenderability defect in the application pursuant to its FM "hard look" processing procedures; (2) the revised tenderability requirement as applied to financial certifications is too vaguely worded, is ambiguous, and is insufficient to apprise applicants of the consequences of a negative certification; and (3) to the extent that the *Revision Order* may have properly established that negative certifications render an application "unacceptable for filing," rather than "unacceptable for tender," Winter timely amended its application to remove this defect.

DISCUSSION

4. *FM "Hard Look" Policy*. Our FM "hard look" processing rules provide for a "tender review of [non-reserved band FM] applications. *"Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19936, 19940 (May 13, 1985) (*"FM Processing Order"*) (subsequent history omitted).[3] That is, in order "to prevent carelessly prepared, unprocessable applications from burdening the processing system, we... require applications to be substantially complete" by the end of the filing window. *Id.* at 19940, 19941. Amendments seeking to cure tenderability defects will not be accepted after the close of the filing window, and applications not substantially complete (i.e., "tenderable") at that time are to be returned, thereby losing their filing status. *Id.* These application processing rules are codified in the Commission's Rules at 47 C.F.R. §§ 73.3564(a), (d), 73.3573(g), 73.3522(a)(6). In Appendix D to the *FM Processing Order*, the Commission listed requirements that applications must meet to be tenderable. *Id.* at 19945. Therein, we identified the financial certification as a key element of tenderability. We explained:

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[1] WSMK filed consent motions for extension of time on May 7 and 24, June 28, and July 22, 1991. For good cause shown, these motions are hereby granted. Therefore, WSMK's opposition is timely filed.

[2] On September 19, 1991, Winter filed an unopposed "Motion for Acceptance of Revised Reply" requesting that we accept a revised reply conforming to the page limitation prescribed in our rules. *See* 47 C.F.R. § 1.115(f)(1). For good cause shown, the motion is hereby granted. In addition, the "Motion to Strike" filed on September 13, 1991 by WSMK is hereby dismissed as moot.

[3] In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265, 7269 (1991).

> [2. b.] *Financial ability to construct.* The Commission authorizes new or changed facilities with the expectation that such will be built quickly and that service will be expeditiously provided via those facilities to the public. It is pointless to grant an authorization of facilities that cannot be built. It is likewise pointless to process an application where a response to certification of financial ability to construct is not provided.

Id.

5. After a non-reserved band FM application has been found acceptable for tender, it is then studied by the Commission's staff to determine whether it complies with core technical rules and certain statutory or international treaty requirements. Only after the application has been found to comply with these requirements is it deemed to be acceptable for filing. *Id.* at 19946; *see also Public Notice*, Patently Defective AM & FM Construction Permit Applications, 49 Fed. Reg. 47331 (December 3, 1984).[4] Applications may be amended as a matter of right during the 30-day period following the Commission's issuance of a Public Notice announcing their acceptance for tender, provided that the amendments may not correct deficiencies in the tenderability of the underlying application. 47 C.F.R. § 73.3522(a)(6); *see* 50 Fed. Reg. at 19941.

6. In other broadcast services, different processing rules apply. *See, e.g.*, 47 C.F.R. §§ 73.3571 (AM service), 73.3572 (TV services). No tenderability review is made. Applications in these other services, if not substantially complete, are returned as unacceptable for filing pursuant to 47 C.F.R. § 73.3564 which states, in pertinent part, as follows:

> § 73.3564 *Acceptance of Applications*
>
> (a) Applications tendered for filing are... forwarded to the Mass Media Bureau where an administrative examination is made to ascertain whether the applications are complete. Except for... non-reserved band FM... applications, those found to be complete or substantially complete are accepted for filing.... In the case of minor defects as to completeness, the applicant will be required to supply the missing information. Applications that are not substantially complete will be returned to the applicant. In the case of non-reserved band FM applications, those found to be substantially complete at tender will be accepted for tender.... Non-reserved band FM applications that are not substantially complete will be returned to the applicant....
>
> (b) Acceptance of an application for filing merely means that it has been the subject of a preliminary review by the FCC's administrative staff as to completeness.

Thus, the phrase "acceptable for filing" has a more general meaning for applications in other broadcast services, whereas in the non-reserved FM band, applications are specifically "accepted for tender" before being "accepted for filing." *See* paragraph 9 below.

7. *Financial Certifications.* Effective June 26, 1989 -- more than three months before Winter's application was filed -- the Commission as part of its ongoing efforts to discourage the filing of sham or abusive applications modified FCC Form 301, the application form for all commercial broadcast station construction permits, and significantly strengthened its financial certification requirements for all broadcast services. In *Revision Order*, we stated that:

> in order to deter further financially unqualified applicants from participating in the application process, we are adopting a modified version of the "firm financial commitment" approach.... [B]roadcast applications will now be returned as *"not substantially complete"* if the requisite financial certification is not made in the application. *Specifically, if an applicant fails to certify in the application that it is financially qualified (i.e., if it does not respond to the question or checks "No"), its application will be returned as unacceptable or nontenderable pursuant to 47 C.F.R. § 73.3564.*

4 FCC Rcd at 3859 (footnote omitted; emphasis added). We also noted that:

> *This constitutes a change in our current interpretation of 47 C.F.R. § 73.3564. Generally, prior to this Report, only applications for commercial FM stations where the financial certification was left blank were returned as non-tenderable. See [FM Processing Order, supra].* Where the financial certification question was left blank in applications for the remaining services (noncommercial FM, AM and TV), and where the financial certification box was checked "No" in applications for all services (commercial and noncommercial FM, AM and TV), an issue was designated against the mutually exclusive applicant for resolution in the hearing, and a deficiency letter was issued against a single applicant which, if not cured, made the application ungrantable.

Id. at n.71 (emphasis added). Thus, applications in the non-reserved FM band (such as Winter's) which bear a negative financial certification are to be regarded as not substantially complete and therefore are to be returned as nontenderable pursuant to 47 C.F.R. § 73.3564(a). Similarly, defective applications in other broadcast services, which are not subject to a tenderability review, are nonetheless also not substantially complete and therefore are to be returned as unacceptable for filing.

8. Winter's challenge to the sufficiency of notice of the strengthened financial certification requirements adopted in *Revision Order* is wholly without merit. That *Revision Order* was appropriately summarized in the Federal Register, where it was explained:

> The changes made by the Commission also include adoption of a modified version of the "firm financial commitment" standard. Under this standard,

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[4] The *FM Processing Order* made no substantive changes in the *acceptablity* criteria for non-reserved band FM applications, which have never included a financial qualifications determination (see paragraph seven, below). *See Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518, n. 5 (1986); *RDH Communications Limited Partnership*, 6 FCC Rcd 4764 (1991).

> applications will be returned as not acceptable or non-tenderable if they do not include the requisite financial certification. Thus, if an applicant fails to certify in Form 301 that it is financially qualified by either not responding to the relevant question or responding "No," its application will be returned as unacceptable or non-tenderable. This additional financial information is necessary to help deter financially unqualified applicants from entering the comparative process or being granted a construction permit.

54 Fed. Reg. 19951, para. 8. The summary thus specifically addressed how negative financial certifications in all new broadcast applications would be treated by the Commission, and therefore complied with Section 552(a)(1)(D) of the Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(D). In addition, since the Commission's published rules (47 C.F.R. § 73.3564) and the *FM Processing Order*, as published in the Federal Register (50 Fed. Reg. at 19940), indicate that the term "non-tenderable" is unique to commercial FM processing procedures, Winter had adequate notice of its meaning in this context. *See Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991).[5]

9. We cannot accept Winter's contention that the *Revision Order* 's statement that applications would be returned either as "unacceptable or nontenderable" referred ambiguously to two different *FM* application processing standards. Instead, our statement signified that *all* broadcast applications that failed to contain the requisite affirmative financial certification were henceforth to be regarded as not substantially complete and were to be returned to the applicant. In the case of non-reserved band FM applicants in particular, the basis of the application return is termed "non-tenderability"; in the other broadcast services, the application is deemed "unacceptable for filing." Because Winter's FM application, at the close of the filing window, contained a negative financial certification, it was properly returned as nontenderable. The staff cited in support of its action the language in *Revision Order* that advises that applications with a "No" financial certification "will be returned as unacceptable or non-tenderable pursuant to 47 C.F.R. § 73.3564. " We affirm the Bureau's action.

10. ACCORDINGLY, IT IS ORDERED, That the application for review filed on April 22, 1991 by R. J. Winter, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[5] Winter cites language in *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977), in support of its argument that the Federal Register summary of the *Revision Order* was inadequate. In that case, the Environmental Protection Agency's "Development Document" (referenced in its regulations) was never published in the Federal Register. Here, however, all relevant requirements were published in the Federal Register.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Global Communications, Inc.

Request for waiver of
Section 80.453 of the Rules
to permit public coast
station WAH to serve mobile
vehicles on land.

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1992; Released: April 3, 1992

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. Global Communications, Inc. (Global), licensee of public coast station WAH, located in the Virgin Islands, has requested a waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of its station license to permit it to use its very high frequency (VHF) public correspondence channels to serve a limited number (approximately 100) of land mobile vehicles on a secondary basis. This action grants the requested waiver.

II. BACKGROUND

2. In the *Report and Order* in PR Docket No. 86-2, 1 FCC Rcd 1312 (1986) (*Report and Order*), the Commission declined to adopt rules that would have permitted VHF public coast stations to serve vehicles on land on a subsidiary basis. In deciding not to adopt such general rules, the Commission found that conditions in the VHF public coast station market are not sufficiently homogeneous to permit such service nationwide. The Commission stated: "The comments point out that maritime frequencies in many areas of the country are already extremely congested. In other areas of the country, however, lakes and rivers freeze and the seasonal factors greatly affect capacity." *Report and Order* at paragraph 7. Further, the Commission recognized that "there may be cases where individual stations or a system of stations may have excess capacity on an hourly, daily or seasonal basis and could design a subsidiary service to vehicles which would ensure against interference to or derogation of maritime communications." *Report and Order* at paragraph 8. The Commission indicated that it would consider such requests for a waiver of the rules on an *ad hoc* basis. The Commission has granted four such waivers to date.[1] The Commission based the waivers on the fact that each station had limited marine traffic which was variable in terms of peak usage. The Commission allowed land mobile service to be offered to a limited number of vehicles during off peak periods on a secondary basis. The Commission has received no complaints about these operations.

III. DISCUSSION

3. In support of its request, Global states that their Virgin Islands communications system has excess capacity at certain times of day, especially at certain times of the year, and can accommodate additional traffic without interfering with its ability to serve ships at sea. Further, Global states that it anticipates that the majority of the customers who will use the proposed land mobile service will be the same customers now using Global's marine services, thus saving those customers the necessity of buying two radios. Global proposes to provide services only to a limited number of land vehicles, approximately 100, within seven miles of the WAH tower. Additionally, Global states that the land mobile service will be secondary to the marine service and will only be provided when there is an operator on duty, to assure that vessels have priority use of the allocated channels.

4. We are waiving the rules to permit Global to provide subsidiary service to the limited number of land vehicles as requested. The waiver is contingent, however, on the conditions set forth below. Furthermore, such subsidiary service must cease within thirty days of the date of written notice by the Commission if the Commission's staff determines that maritime communications are being impaired.

5. To minimize the potential for interference with other maritime safety or operational communications, the radio equipment installed in vehicles served by Global must be type accepted for use in the Maritime Services (Part 80), the Private Land Mobile Services (Part 90), or the Public Mobile Service (Part 22) and must be capable of operating only on the maritime VHF public correspondence channels authorized for use by public coast station WAH. The mobile radios installed in vehicles may be crystal controlled with only the appropriate crystals installed, or frequency synthesized equipment with switch or front panel "blocks" to prevent operation on other channels. The radios installed in the vehicles must not be capable of being tuned by front panel operation to any VHF channel other than those authorized for station WAH. Electrical or mechanical modifications of equipment beyond the scope of Class I permissive changes are not necessary to satisfy this condition. Therefore, no filing with the Commission should be required regarding such changes. *See* Section 2.1001 of the Rules, 47 C.F.R. § 2.1001. Our intent is to prevent equipment installed in vehicles from operating on unauthorized frequencies by merely tuning such frequencies with external controls.

6. In the *Notice of Proposed Rule Making* in PR Docket No. 86-2, 51 Fed. Reg. 4552 (1986), at paragraph 8, the Commission indicated its intention to license subsidiary services on a "system basis." That is, it proposed that land

[1] *See In the Matter of Answer Exchange, Inc.*, 3 FCC Rcd 633 (1988), *In the Matter of Whidbey Telephone Company*, 4 FCC Rcd 2d 8305 (1989), *In the Matter of Recreational Marine Association*, 4 FCC Rcd 6287 (1989), and *In the Matter of Request for waiver of Section 80.453 of the Rules to permit public coast station WHU247 to serve mobile vehicles on land*, 6 FCC Rcd 2d 4846 (1991).

vehicles utilize a public coast station's excess capacity to operate under the public coast station's license. Vehicle identification must consist of the public coast station's call sign and a numeric or alphabetical unit identifier. This increases the public coast station's incentive to control the vehicles' communications because enforcement efforts will focus on the public coast station licensee rather than on individual vehicle operators. Also, authorizing subsidiary service on a system basis reduces paperwork requirements for both the public and the Commission by eliminating the need for separate licenses for each vehicle. Therefore, the license of Global will be modified accordingly. This method of licensing and identification will ensure that the licensee will take all necessary steps to prevent impairment of maritime services, consistent with the concerns expressed in PR Docket No. 86-2.

IV. CONCLUSION

7. In view of the above, IT IS ORDERED that the requests for waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of public coast station license WAH submitted by Global Communications, Inc. to serve land mobile vehicles, on a secondary basis, ARE GRANTED subject to the conditions set forth in paragraphs 5 and 6 above and subject to the condition that no impairment or interference is caused to maritime communications services.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 23, 1992

PLEADING CYCLE ESTABLISHED FOR LEC PETITIONS FOR WAIVER OF THE COMMISSION'S ACCESS TIME STANDARDS FOR DATA BASE SERVICE

CC DOCKET NO. 86-10

Six local exchange telephone companies (LECs) have filed petitions for waiver of certain provisions of the Commission's *Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking* adopted August 1, 1991 in CC Docket No. 86-10, 6 FCC 5421 (*Reconsideration Order*). Specifically, on February 28, 1992, BellSouth Telecommunications, Inc. (BellSouth) and US West Communications, Inc. (US West), filed petitions for waiver. On March 2, 1992, New England Telephone and Telegraph Company and New York Telephone Company (NYNEX) and GTE Service Corporation and its affiliated domestic telephone operating companies (GTE), filed petitions for waiver. On March 6, 1992, United Telephone Companies (United) filed a petition for waiver and on March 19, 1992, Ameritech Operating Companies (Ameritech) filed a petition for waiver.

The petitioning parties seek waiver of the access time standards in the *Reconsideration Order*. Pursuant to these standards, the Bell Operating Companies and GTE Telephone Companies are required to reduce access times under a data base system of 800 access to five seconds or less for 97% of their originating 800 traffic by March 1993, and for all of their data base 800 traffic within two years thereafter. In addition, by March, 1995, the mean access time for each of these LEC's 800 data base traffic must be 2.5 seconds or less. *See* 6 FCC Rcd at 5425.

The petitioning parties state that actual testing of the data base system indicates that data base system access times will be greater than previously projected and that consequently, they cannot meet the Commission's access time standards and deadlines at a reasonable cost. BellSouth asks the Commission to waive the access time requirement of the *Reconsideration Order* to permit: (i) an access time of 5 seconds or less for 9 of BellSouth's traffic by March 1993; and (ii) an access time of 5 seconds or less for 98% of its traffic by March 1995, with a mean access time of 2.5 seconds. BellSouth states that it would reduce access time to 5 seconds or less for all of its traffic no later than December 1997.

NYNEX asks the Commission to waive the access time requirements of the *Order* to permit: (i) an access time of 5 seconds or less for 92% of NYNEX's traffic by March 1993; and (ii) an access time of 5 seconds or less for 98% of its traffic by March 1995, with a access time of 2.5 seconds or less. GTE asks the Commission to waive the access time requirements to permit: (i) an access time of 5.5 seconds or less for 97% of GTE's traffic by March 1993. United asks the Commission to permit: (i) an access time of 5 seconds or less for 90% of United's traffic by March 1993. United states that it would provide an access time of 5 seconds or less for all its traffic by December 1997. Ameritech asks the Commission to permit: (i) an access time of 5 seconds or less for 78% of Ameritech's traffic by March, 1993; and (ii) an access time of 5 seconds or less for 94% of its traffic by 1995, with a mean access time of 1.1 seconds.

In seeking its waiver, US West asserts that Bellcore testing indicates that 64% of US West's 800 traffic will have access times of less than 5 seconds by March 1993. US West states, however, that current NXX access times are longer than previously represented and that its requested waiver would result in only a small increase from current access times.

The petitioning parties state that granting the waivers is in the public interest. By granting the waivers, they maintain, the Commission will be promoting competition in the 800 service market, while at the same time allowing telephone companies to insure an orderly transition to number portability at reasonable expense without compromise to the network.

Interested parties should consolidate their responses to these six petitions and file comments by April 13, 1992, and reply comments by April 23, 1992, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Marian Gordon, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commissioner's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. Sections 1.1200-1.1216. For further information, contact Marian Gordon or Gary Phillips, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 27, 1992

Released: March 27, 1992

Margaret Bohannon-Kaplan 8330-O
Attorney At Law 92020039
Rio Rd. and Carmel Rancho Blvd.
P.O. Box 223159
Carmel, CA 93922

Dear Ms. Bohannon-Kaplan:

This is in response to your recent request for clarification of the definition of a "legally qualified candidate for public office," as codified in Section 73.1940 of the Commission's rules. 47 C.F.R. Section 73.1940. That definition was included in Appendix B to the recent *Report and Order, Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991) (*"Report and Order"*), to which you refer in your letter. Specifically, you urge modification of Section 73.1940(b)(2) to include as a legally qualified candidate, a person: "commiting oneself to obtaining the signatures necessary to qualify for a place on the ballot. "

You indicate that you intend to run as an independent candidate for the U.S. Senate in California, and that "most political experts" predict that the opponents you will face in the November 1992 general election will be Republican John Seymour and Democrat Diane Feinstein. You state that in order to gain even a tiny fraction of the name recognition enjoyed by your "opponents," it is imperative that you begin advertising as soon as possible. You apparently attempted to purchase time on a San Francisco radio station, but were informed that you would not be able to air your commercials until August 1992, which is the earliest date under California law that you would be able to qualify for a place on the November ballot as an independent candidate. You argue that this would give your already known opponents, who can begin advertising on radio and television in March 1992, "yet another grossly unfair advantage." You, therefore, urge that the Commission's rules be clarified so that you could be deemed a legally qualified candidate upon committing yourself to obtaining the signatures necessary to qualify for a place on the ballot.

DISCUSSION

We first note that, due to the operation of California law regarding the timing of an independent candidate's placement on the ballot, it appears that your Democratic and Republican "opponents" do qualify for reasonable access to broadcast stations under the Communications Act and the Commission's rules prior to independent party candidates such as yourself. However, your desire to rectify this alleged inequity cannot be accomplished through "clarification" of the Commission's definition of a legally qualified candidate in the recent *Report and Order*. The Commission did not modify, propose to modify, or otherwise consider changing the definition of a legally qualified candidate in that proceeding. The definition of a legally qualified candidate was included in an appendix to the *Report and Order* only because of the need to renumber existing rules in light of other changes to the rules. Your request for clarification involves a substantive change in Section 73.1940. Since the Commission took no action with respect to the definition of legally qualified candidate, your request for clarification is beyond the scope of that proceeding, and, therefore, cannot be considered at this time.

Should you wish to pursue this matter further, the proper procedural mechanism would be the filing of a petition for rule making. *See* 47 C.F.R. Section 1.401. Petitions for rule making must conform to certain procedural requirements, and must:

> [S]et forth the text or substance of the proposed rule, amendment, or rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests of petitioner will be affected.

Id. Statements by interested persons in support of or in opposition to a petition for rulemaking, and replies to such statements, are allowed under the Commission's rules. 47 C.F.R. Sections 1.403, 1.405. A petition that is "moot, premature, repetitive, frivolous, or which plainly [does] not warrant consideration," may be denied or dismissed by the Commission. 47 C.F.R. Sections 1.401(e), 1.407.

We wish to clarify that, with respect to the San Francisco station's "impression" that you cannot air your commercials until August 1992, the Commission's rules do not *prohibit* stations from airing your political advertisements prior to your becoming a legally qualified candidate. Thus, your advertisements may be broadcast at any time on any station that agrees to sell you time. However, stations are *required* to sell advertising and programming time only to legally qualified federal candidates pursuant to the reasonable access provision of Section 312(a)(7) of the Communications Act. 47 U.S.C. Section 312(a)(7). Until such time as you become a legally qualified candidate, the political laws do not require stations to sell you advertising time. Similarly, the equal opportunites and lowest unit charge provisions of Section 315 of the Communications Act do not apply until you become a legally qualified candidate. 47 U.S.C. Section 315.

The date when broadcasters must sell or give time to your opponents is governed by the reasonable access provision of Section 312(a)(7). Under that policy, access must be provided to legally qualified federal candidates *at least* during the 45 days before a primary and the 60 days

before a general or special election.[1] Whether broadcasters are required to provide access to legally qualified federal candidates before these periods is determined by the Commission on a case-by-case basis, taking into account certain objective criteria. *Id.* at n. 15.

Based on the foregoing, your request for clarification is hereby DISMISSED.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, (Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail.

Sincerely,

Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

[1] *Report and Order*, 7 FCC Rcd at 681. You refer in your letter to Section 73.1940(c) as allowing your opponents to begin advertising on radio and television in March 1992, 90 days before the primary election. Section 73.1940(c) sets forth the definition of a legally qualified candidate for public office (other than for President or Vice President) where nomination is by means of a convention, caucus, or similar procedure, as opposed to nomination by means of a primary election. In California, nomination is by means of a primary election, and thus Section 73.1940(c) does not apply to you or your opponents.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 9
F.C.C. No. 4	

ORDER

Adopted: March 27, 1992; Released: March 27, 1992

By the Chief, Common Carrier Bureau:

1. On March 16, 1992, AT&T Communications (AT&T) filed Contract Tariff Transmittal No. 9 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 4 for AT&T Megacom Service, and AT&T MultiQuest Service.

2. On March 23, 1992, MCI Telecommunications Corporation (MCI) filed a petition to reject or in the alternative to suspend and investigate Contract Tariff Transmittal No. 9.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff Transmittal No. 9 and MCI's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 4, Transmittal No. 9, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon. pending*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Transmittal No. 1563

Revisions to Tariff F.C.C. No. 128

ORDER

Adopted: March 27, 1992; Released: March 27, 1992

By the Chief, Common Carrier Bureau:

1. On December 31, 1991, Pacific Bell (PacBell) filed Transmittal No. 1563 to establish in its special access tariff an optional Alternate Serving Wire Center (ASWC) feature for DS1 and DS3 High Capacity Service. The ASWC feature would provide a customer with the option to obtain service to a serving wire center other than the one that normally serves the customer's premises. This would ensure continuity of transmission to a customer in case of failure within the primary serving wire center. Description and Justification, Section 2 at 1. Transmittal 1563 is scheduled to become effective on March 30, 1992.[1]

2. Metropolitan Fiber Systems, Inc. (MFS) and Williams Telecommunications Group, Inc. (Williams) have filed petitions to reject or to suspend and investigate Transmittal 1563. MFS argues that PacBell's net revenue showing for ASWC as a "new service" under the price cap rules fails because it does not reflect any non-recurring costs. MFS reasons that the "redundant circuit" established by ASWC will necessarily require additional terminating electronics, and that this in turn will entail additional non-recurring installation costs, which are not reflected as such in PacBell's net revenue computations. MFS Petition at 2-4.

3. Williams generally supports ASWC, but objects to the apparent exclusion of customers who desire an optical interface rather than an electrical one. Williams Petition at 24. Williams argues that the ineligibility of optical interfaces for the ASWC option constitutes a violation of a carrier's duty to serve and interconnect under Section 201(a) of the Communications Act, 47 U.S.C. § 201(a), and a violation of the prohibition against unjust and unreasonable practices and classifications under Section 201(b) of the Act, 47 U.S.C. § 201(b). *Id.* at 2-3, 5-6. Similarly, Williams believes that this limitation violates the prohibition against unreasonable discrimination under Section 202(a) of the Act, 47 U.S.C. § 202(a), because optical and electrical interfaces are functionally equivalent, "like" services, the only difference being the demarcation point. *Id.* at 6-7.

4. PacBell replies that MFS's argument on the absence of non-recurring costs and charges in its net revenue sharing is founded on misunderstandings about the nature of ASWC. According to PacBell, ASWC is not a secondary, redundant circuit which requires a second set of loops, electronics, and associated installation costs. Rather, PacBell explains, it is an option, at an additional recurring charge, which allows the customer to have the channel termination at one end of its single circuit located at a different serving wire center than normal; all other non-recurring and recurring charges for mileage and channel terminations remain the same. PacBell Reply at 2-3.

5. PacBell replies to Williams that it included only electrical interfaces in its ASWC tariff because all the potential customers who had expressed an interest in this option wanted electrical interfaces only. PacBell further states that it is not opposed to offering ASWC with optical interfaces, and that it is willing to discuss the matter with Williams to estimate demand and develop cost support for such a service. *Id.* at 4. Moreover, PacBell argues that Williams' likeness analysis for its Section 202(a) discrimination claim is fallacious because ASWC for electrical interfaces is being compared to a nonexistent, hypothetical ASWC for optical interfaces. There is nothing discriminatory *per se* or otherwise unlawful, PacBell contends, for an option to be made available with one type of interface but not another. *Id.* at 4-5.

6. The Common Carrier Bureau has reviewed PacBell's Transmittal 1563 and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1563, filed by Metropolitan Fiber Systems, Inc., and Williams Telecommunications Group, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] On March 4, 1992, PacBell filed revisions to provide for one new rate element for DS3 without terminal equipment (optical handoff) for ASWC. Transmittal No. 1563, dated March 4, 1992, Section 7.5. 9(C) at 2nd Revised Page No. 334.1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc. — Transmittal No. 222

Tariff F.C.C. No. 1

ORDER

Adopted: March 27, 1992; Released: March 27, 1992

By the Deputy Chief, Common Carrier Bureau:

1. By Transmittal 222, US West Communications, Inc. (US West) seeks to restructure its Optical Interface DS3 channel termination rate element. Specifically, US West would establish two rate elements based on mileage bands: one for customers located one-quarter mile or less from US West's serving wire center (one-quarter mile channel termination) and one for customers located more than one-quarter mile from the same serving wire center (standard channel termination). Tr. 222 Description and Justification (D&J) at 1.1-1.2. Under Transmittal 222, one-quarter mile channel termination is priced roughly 25 percent less than the standard channel termination; rates for standard channel termination are roughly 6 percent higher than the current flat rate for channel termination. *See id.* at 1.4.

2. Based upon our review, we conclude that the provisions of Transmittal 222 are vague and incomplete, making the tariff patently unlawful. We therefore reject the transmittal.

3. Williams Telecommunications Group, Inc. (WilTel) filed a petition to reject or suspend and investigate Transmittal 222, arguing *inter alia* that the changed rates would confer a competitive advantage upon AT&T. WilTel Petition at 2.[1] A petition to reject or, in the alternative, suspend and investigate Transmittal 222 was also filed by MCI Telecommunications Corporation (MCI). In that petition, MCI argues *inter alia* that US West has supplied no cost support showing the costs of the distance sensitivity of its DS3 optical interface channel terminations, and has failed to explain why it chose the one-quarter mile distance from its serving wire center as a cut-off. MCI Petition at 6. Therefore, MCI asserts, the quarter-mile charge may be unjust, unreasonable, and unlawful under Section 201(b). *Id.*

4. Finally, MCI argues, US West failed to state how it intends to calculate the airline mileage between the customer designated premises and its serving wire centers. MCI contends that since the customer designated premises is not a local exchange carrier (LEC) serving wire center, can be located anywhere, and does not have vertical and horizontal (V & H) coordinates identified in National Exchange Carrier Association Tariff (NECA) F.C.C. No. 4 (which publishes the V & H coordinates for LEC serving wire centers), this distance is impossible to calculate by current methods. *Id.* at 7. MCI concludes that Transmittal 222 therefore violates Section 61.54(j) of the Commission's Rules, which requires that rates and general rules be stated "clearly and definitely." *Id.* at 6-7.

5. US West claims in its reply that its unit cost study in Transmittal 222 demonstrates that the direct costs of providing a DS3 with a one-quarter mile channel termination are significantly less than the costs of providing DS3s with longer channel terminations. US West Reply at 5-7.

6. US West states that it plans to use a software program called "ARC/INFO" to measure the airline distance between the serving wire center and customer premises. *Id.* at 7-8. US West notes that while it has discussed the use of such software with its interexchange carrier customers in "Carrier Focus Groups" it should have discussed more thoroughly the method by which it would measure airline distance in the D&J which accompanied Transmittal 222. *Id.* at 8. US West contends, however, that its failure to include such a discussion in no way renders Transmittal 222 unclear or in violation of Section 61.54(j) of the Commission's Rules, because the tariff clearly states that distance will be measured in airline miles. *Id.*

7. We have concluded that Transmittal 222 does not comply with Section 61.54(j) of the Commission's Rules, 47 C.F.R. § 61.54(j), which requires that the general rules, regulations, exceptions, and conditions which govern a tariff be stated "clearly and definitely." That rule section also requires that any rules, regulations, exceptions, or conditions which "in any way affect the rates named in the tariff must be specified." As MCI notes in its petition, it is impossible from the face of Transmittal 222 to compute the airline mileage on which US West will base its termination rates, and therefore impossible to determine what rate will be charged.

8. Transmittal 222 states:

> Optical Interface Capacity is available with either a Standard Channel Termination or a 1/4 Mile Channel Termination. The Standard Channel Termination will be for all customer designated premises located beyond 1/4 airline mile from the Telephone Serving Wire Center. The DS3 1/4 Mile Channel Termination is available only for those customer designated premises located within 1/4 airline mile from the Telephone Company Serving Wire Center. The DS3 1/4 Mile Channel Termination is only available utilizing the Optical Interface.

Currently, Section 7.4. 6 of US West Tariff F.C.C. No. 1 contains the method to be used for determining mileage for the rate for transport channels in general. The tariff states that airline mileage is measured between telephone company serving wire centers associated with customer designated premises or telephone company hubs. These telephone company serving wire centers and hubs are identified in NECA Tariff F.C.C. No. 4, and are assigned

[1] We have not summarized in detail Wiltel's arguments -- or US West's response to those arguments -- because we are rejecting Transmittal 222 on other grounds.

V & H coordinates. NECA Tariff F.C.C. No. 4 also specifies the method for calculating the actual mileage. Section 7.4. 6 of the US West tariff references that document.

9. The instant transmittal does not provide a similar procedure for determining the critical one-quarter mile distance for a quarter mile channel termination. There is no indication in the tariff of the basis for identifying the customer's location (*i.e.*, no V & H coordinates), nor is there any explanation of the procedure to be used in actually calculating the onequarter mile distance. Without a method to identify the customer location, such as associating that location with a serving wire center or hub that is assigned V & H coordinates, there is no way that a customer can examine the tariff and determine whether the standard channel termination rate or the onequarter mile channel termination rate applies. Thus, the tariff does not state "clearly and definitely" the rules, regulations, and conditions which govern the tariff. In addition, the tariff fails to specify the rules, regulations, or conditions which affect the rates charged in the tariff.[2] For this reason, Transmittal 222 violates Section 61.54(j) of the Commission's Rules and therefore must be rejected.

10. Accordingly, IT IS ORDERED that US West Communications, Inc., Tariff F.C.C. No. 1, Transmittal No. 222 IS REJECTED.

11. IT IS FURTHER ORDERED that the petitions to reject, or alternatively, suspend and investigate US West Tariff F.C.C. No. 1, Transmittal No. 222, filed by MCI Communications Corporation and Williams Telecommunications Group, Inc., ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

12. IT IS FURTHER ORDERED that US West Communications, Inc., SHALL FILE a supplement reflecting this rejection no later than five business days from the release of this Order. Special Permission No. 92-205 is assigned for this purpose.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[2] US West's only explanation of how it will compute airline mileage is in its reply, which states briefly that the "ARC/INFO" software program will be used for this purpose. US West Reply at 8. US West then explains that "ARC/INFO is an off-the-shelf software application available from a geographic information system vendor." *Id.* at 8 n.26. Clearly this explanation does not satisfy the requirements of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

PACIFIC NATIONAL CELLULAR — File No. 10310-CL-P-402-A-88

For Facilities in the Domestic Public Cellular Radio Telecommunications System On Frequency Block A in Market No. 402, Illinois-9

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 1992; Released: March 16, 1992

By the Chief, Mobile Services Division:

I. BACKGROUND

1. On January 29, 1992, the Commission issued a Public Notice, Mimeo No. 21449, announcing that the Commission would conduct lotteries on April 8, 1992, to select winning cellular radio applications in 29 Rural Service Areas (RSAs). In each of these markets, lotteries had been held previously, but the winning applications had been found defective under the Commission's rules and dismissed. One of the dismissed applicants was Pacific National Cellular (Pacific), whose application is captioned above. Pacific filed a petition for reconsideration of the Mobile Services Division (MSD) dismissal which was denied by the full Commission in *Butte Cellular Group*, 6 FCC Rcd 6745 (1991).[1] Pacific filed a petition for reconsideration of that order. It now seeks to stay the non-wireline lottery for Market 402, pending final review of its petition for reconsideration.

2. Pacific argues that the Commission has not acted on its supplements to its 1991 petition or on its 1992 petition which allege the Commission's non-compliance with the Paperwork Reduction Act (PRA). According to Pacific, it cannot be penalized for failure to comply with the RSA financial qualification rule Section 22.917(c) because the Commission failed to obtain prior approval from the Office of Management and Budget (OMB) as required by the PRA. Pacific also maintains that all of the criteria for granting a stay of the Illinois 9 RSA lottery set out in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1977) are met. First, it contends that it is highly likely that it will prevail on the merits of its appeal because Section 22.917(c) lacked a valid OMB control number.[2] Second, Pacific argues that it will suffer irreparable harm if the April 8, 1992 lottery is conducted because it will suffer economic loss by having to expend funds to contest the award of an authorization to the new lottery winner. Third, Pacific argues that no other interested parties will be substantially harmed by a stay of the new lottery because it would merely maintain the status quo with respect to a final determination of a license award. Fourth, Pacific contends that a stay of the new lottery is in the public interest because a new lottery will result in additional and costly litigation and ultimately cause more delay in granting a permanent license.

II. DISCUSSION

3. Pacific has failed to make a sufficient showing to justify the extraordinary relief it seeks. It has not shown that it will suffer irreparable injury if the lottery takes place as scheduled. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). ("It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm.") The lottery procedure neither constitutes, nor automatically results in, the grant of a construction permit. Rather, it initiates a process which will require some time before the issuance of a construction permit. Even after that process is completed, it is clear that other relief is available should the petitioner wish to challenge the grant of a construction authorization to a lottery winner by filing a petition for reconsideration or an application for review of the grant. *See Virginia Petroleum Jobbers Association, supra*. The courts have recognized that license grants which are challenged by litigation may be undone if the basis of the grant is reversed. *See, e.g., Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976). Moreover, in the public notice announcing the new lottery, the MSD stated that an authorization will be conditioned upon the Commission's action dismissing the application of the previous winner becoming final and no longer subject to judicial review. Accordingly, we conclude that Pacific has failed to demonstrate that it will suffer irreparable harm, as is required for the grant of a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). We further note that granting a stay would harm the public in general and other interested parties because a delay of the lottery would deny expeditious service to the public if Pacific's petition for reconsideration turns out to be unsuccessful.

4. Accordingly, IT IS ORDERED that the request for stay filed by Pacific National Cellular (File No. 10310-CL-P-402-A-88) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Pacific filed two supplements to its petition for reconsideration, on November 4, 1991 and November 18, 1991, after the Commission adopted the Memorandum Opinion and Order dismissing its application.

[2] Pacific notes that Radiophone Corporation, another applicant which raised a similar PRA issue and whose request for a stay of a new lottery was denied by the MSD, actually succeeded on the merits of that issue. This is further reason, Pacific argues, for granting a stay in the instant case. However, we point out that the specific subsections of Section 22.917 relied upon by

Radiophone and Pacific are not the same. Thus, on reconsideration, Pacific's chances for success on the merits is not necessarily the same as Radiophone's.

*U.S. Government Printing Office: 1992 — 312-024/60015